1879
10-699

Field.

March 4. 1880

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 166.

THE FIRST NATIONAL BANK OF CARLISLE, PENNSYLVANIA, WILBUR F. SADLER, RECEIVER, PLAINTIFF IN ERROR,

VS.

FANNIE L. GRAHAM.

IN ERROR TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

FILED AUGUST 13, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 166.

THE FIRST NATIONAL BANK OF CARLISLE, PENNSYLVANIA, WILBUR F. SADLER, RECEIVER, PLAINTIFF IN ERROR,

vs.

FANNIE L. GRAHAM.

IN ERROR TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

INDEX.

	Original.	Print.
Docket entries common pleas (1)	2	1
Præcipe and narr., common pleas	4	2
Plea	7	3
Rule to arbitrate	8	3
Award	10	4
Appeal from award	11	5
Notes of trial (1)	12	5
Defendant's testimony	22	9
Plaintiff's rebutting testimony	38	14
Charge of the court	42	15
Plaintiff's points	54	20
Answers to plaintiff's points	58	21
Defendant's points	60	22
Answers to defendant's points	63	22
Motion and reasons for new trial	65	23
Additional reasons	67	24
Opinion of court on motion for new trial	68	24
Verdict and judgment common pleas (1)	70	25
Docket entries supreme court Pennsylvania (1)	72	26
Assignments of error supreme court Pennsylvania (1)	76	28
Judgment supreme court Pennsylvania (1)	82	32
Docket entries common pleas (2)	85	33
Notes of trial and testimony (2)	86	33
Defendant's testimony (2)	93	40
Plaintiff's rebutting testimony (2)	99	45
Charge of court (2)	101	46

	Original.	Print.
Plaintiff's points and answers (2)	102	47
Defendant's points and answers (2)	105	49
Verdict common pleas (2)	110	51
Docket entries supreme court Pennsylvania (2)	111	52
Assignments of error (2)	116	54
Judgment supreme court Pennsylvania (2)	124	59
Writ of error	126	60
Writ of error bond	129	60
Petition	130	61
Citation	132	62
Clerk's certificate	133	63

1 The answer of the justices of the supreme court of the State of Pennsylvania to the writ of error from the Supreme Court of the United States, hereunto annexed, to wit:

2 Among the records of the court of common pleas of Cumberland County, Penna., No. 151, November term, 1873, the following proceedings appear, to wit:

Summons in trespass on the case.

FANNIE L. GRAHAM
vs.
FIRST NAT'L BANK, CARLISLE, PA. } 151.

Entered Oct. 13, 1873.
Præcipe & narr.

Att'y	2 50
"	2 00
Sh'ff F. S. & B	2 98
Tr. L. L	50
Proth'y W	30
A'b's p'd by plaint	16 00
Proth'y W	4 16
" appeal	75
Pl'ff's bill before arb's	3 55
Sub'y on due	30
Verdict fee p'd by att'y	4 00
Proth'y W	2 16
Pl't'ff bill costs J. T., 74	10 60
	49 80
Proth'y W	75
" " sub'y	30

Oct. 13, 1873.—Rule at instance of plaintiff that arb's be chosen on Tuesday, the 28th inst.

October 13th, 1873.—Served the within summons Samuel Hepburn, sr., president of the 1st National Bank of Carlisle, Pa., by making contents known to him & by copy. Served rule same date, as per oath endorsed on rule.

October 28th, 1873.—Parties by their att'ys appeared at the prothonotary's office, and make choice of John Reep, Wm. Miles, & John B. Floyd, as arbitrators.

The parties being unable to agree as to the time of meeting, the prothonotary filed Thursday, the 13th day of November, 1873. (All notices waived.)

Nov. 13, 1873.—By agreement of parties, filed meeting of arbitrators postponed until 25th inst.

Nov. 27th, 1873.—Report of arbitrators filed, finding for the plaintiff four thousand five hundred & sixty dollars ($4,560).

Judgment nisi.

Judgment docket No. 8, Page 19.

3 And now, to wit, January 6th, 1874, a jury of the county being called, came, to wit, David Reif, Adam Fisher, John Hurst, John Hoffert, George Epley, S. G. Glauser, Jacob Rebuck, J. C. Ernst, David Doner, John Stough, Joseph Egoef, and Geo. Wonderlich, who being

severally balloted for, elected, empanneled, sworn, and affirmed, respectively do say they find for the plaintiff $4,790 damages.

January 21, 1874.—Motion for a new trial and reasons therefor filed.

January 23d, 1874.—Additional reasons for a new trial filed by leave of court.

August 24th, 1874.—Motion for a new trial overruled.

Judgment.

Judgment docket No. 8, page 22.

Feb'y 2d, 1875, w'it of error filed.

STATE OF PENNSYLVANIA,
Cumberland County, ss:

I, D. W. Worst, of the court of common pleas of said county, do certify the foregoing is a true copy taken from the records of said court.

Witness my hand and seal of court at Carlisle, this 13th day of Feb'y, A. D. 1875.

D. W. WORST, *Proth'y*,
Per J. P. BRINDLE, *Dep'y*.

{ COURT OF COMMON PLEAS
{ OF CUMBERLAND CO., PA.

4 *Præcipe and narr.*

Common pleas of Cumberland County.

F. L. GRAHAM
vs.
FIRST NAT'L BANK CARLISLE, PA. } No. 151. November term, 1873.

SIR: Issue summons in trespass on the case.

JNO. H. GRAHAM & SON &
HENDERSON & HAYS,
Att'ys for Plaintiff.

To Proth'y of Cumb. Co.
OCT. 13, 1873.

CUMBERLAND COUNTY, *ss:*

First National Bank of Carlisle, Penna., was summoned to answer Miss Fannie L. Graham of a plea of trespass on the case, &c.

Whereupon the said Fannie L Graham, by Henderson & Hays & Graham, her attorneys, complains—

That whereas, on the twenty-second day of October, in the
5 year of our Lord one thousand eight hundred and sixty-eight, at the county aforesaid, the said Fannie did leave in said bank for safe-keeping four thousand dollars, to wit, in four United States five-twenty bonds of 1867, numbered as follows, 214567, 214568, 214569, 23983, which said bonds were to be returned to her on the return of a receipt, then and there given to her by Charles H. Hepburn, the cashier of said bank, which said receipt was and is as follows:

[First Nat'l Bank of Carlisle, Pa. Designated depository of the United States. Samuel Hepburn, president. Chas. H. Hepburn, cashier.]

CARLISLE, PA., *Oct.* 22d, 1868.

Miss Fannie L. Graham has left in the bank for safe-keeping four thousand dollars ($4,000) in U. S. 5-20 bonds of 1867. To be returned on the return of this receipt.

CHAS. H. HEPBURN, *Cashier.*

And the said Fannie doth say and aver that the aforesaid Chas. H. Hepburn, cashier, and Hon. Sam'l Hepburn, president, of said bank, although often requested and the aforesaid receipt tendered to them severally, the aforesaid bonds, of the value of four thousand dollars
6 to her to return, hitherto hath wholly refused and still doth refuse, to the damage of the said Fannie L. Graham five thousand dollars.

And therefore she brings suit.

JOHN DOE.
RICHARD ROE,
Pledger to prosecute.

(Endorsed:) No. 151, Nov. T., 1873. Fannie L. Graham vs. First Nat'l Bank of Carlisle, Pa. Receipt and narr. Filed Oct. 13, '73. $2.00 p'd by Graham, jr. Henderson & Hays, Graham & Son.

7 *Plea.*

In the court of common pleas of Cumberland County, Pa., Nov. term, 1873.

FANNIE L. GRAHAM
vs.
FIRST NAT'L BANK OF CARLISLE, PENN'A. } No. 151. Nov. T. 1873.

Plea non-assumpsit; payment with leave.

8 In the court of common pleas of Cumberland County.

MISS FANNIE L. GRAHAM
vs.
FIRST NAT'L BANK OF CARLISLE, PA. } No. 151 of Nov. term, 1873.

Oct. 13th, 1873.—Rule at instance of plaintiff that arbitrators be chosen on Tuesday, 28th Oct. 1873, between the hours of 10 o'clock a. m. and two o'clock p. m., in the prothonotary's office in Carlisle, for the trial of all matters in variance between the parties in this suit.

A true copy from the record.

Witness my hand and the seal of the said court, the 13th day of Oct., 1873.

SEAL OF COM. PLEAS OF CUMBERLAND COUNTY. J. P. BRINDLE, *Dep'ty Proth'y.*

Served personally Oct. 13, 1873.

JAMES K. FOREMAN, *Sh'ff.*

Rule of arbitrators, &c.

In the court of common pleas of Cumberland County, Pa.

FANNIE L. GRAHAM
vs.
THE FIRST NAT'L BANK OF CARLISLE, PA. } No. 151 of Nov. term, 1873.

We, the undersigned, parties to this suit, by our attorneys, hereby agree that meeting of the arbitrators in this case be adjourned over to

the 25th instant at 10 o'clock a m., to meet at the arbitrators' room in the court-house in Carlisle, of which adjournment we accept motion.

Witness our hands the 13th of November, 1873.

J. H. GRAHAM & SON.
HENDERSON & HAYS, *Pl'ff's Att'ys.*
S. HEPBURN, JR.
W. S. SADLER, *Receiver.*
G. E. MAGLAUGHLIN.

CUMBERLAND COUNTY, *sct.:*

In the court of common pleas of the county aforesaid, of the term of November, in the year of our Lord 1873. No. 151.

FANNIE L. GRAHAM
vs.
FIRST NAT'L BANK OF CARLISLE, PA.

And now, to wit, Oct. 25th, A. D. 1873, all the matters in variance in this suit between the parties are, agreeably to and by virtue of an act of assembly, entitled "An act to references and arbitrations," referred to John Keep, Wm. A. Miles, & J. B. Floyd, of the county aforesaid, who, after being all sworn or affirmed, justly and equitably to try all matters in variance submitted to them, shall proceed to investigate, examine, and decide the above-stated suit, and report their determination; and make out an award signed by all, or a majority of them, and transmit the same to the prothonotary according to law, within seven days after they have agreed thereon.

The above named arbitrators are to meet at the arbitration chamber, in Carlisle, on the 13th day of November, 1873, at 10 o'clock in the forenoon.

Certified under my hand and seal of office, at Carlisle, the day and year first above written.

{ SEAL OF COURT OF COM. PLEAS } { OF CUMBERLAND COUNTY. }

J. P. BRINDLE,
Deputy Proth'y.

The undersigned, two of the arbitrators in the above rule mentioned, having met at the time and place mentioned in said rule, and the other arbitrator not attending, adjourned to meet at the same place on the 25th November, 1873, at 10 o'clock a. m.

J. B. FLOYD.
JOHN REEP.

Now, to wit, 25th November, 1873, we, Wm. A. Miles and John Reep, two of the above-named arbitrators, met, and John B. Floyd, the other arbitrator, not attending, the parties by consent made choice of B. Duke to fill the vacancy.

The arbitrators being duly sworn, parties appeared personally and by their attorneys, and after hearing the parties, their proofs and allegations, by consent adjourned to the 26th instant.

Arbitrators met 26th inst., and after hearing the law applicable to the case fully discussed by the counsel on the one side and the other, adjourned to the 27th inst.

And now, to wit, 27th Nov. inst., arbitrators met, and after
11 fully investigating the case, we find for the plaintiff the sum of four thousand five hundred & sixty dollars and costs.

Witness our hands and seals the 27th day of Nov., 1873.

WM. A. MILES. [SEAL.]
JOHN REEP. [SEAL.]
BENJ. DUKE. [SEAL.]

Arbitrators, $12.00; county, 4—16.00. P'd by J. Graham, jr.

Filed Nov. 27th, 1873.

CUMBERLAND COUNTY, *ss:*

In the court of common pleas of Cumberland County, of the term of Nov., A. D. 1873. No. 151.

FANNIE L. GRAHAM
vs.
FIRST NAT. BANK OF CARLISLE, PA.

And now, to wit, on the eighth day of Dec., A. D. one thousand eight hundred & seventy-three, W. F. Sadler, receiver of the said 1st Nat. Bank of Carlisle, Penna., defendant, appeals from the report of arbitrators rendered in this case to the court of common pleas, and comes in person before the prothonotary of said county, and being duly sworn according to law, deposes that the said appeal is not for the purpose of delay, but because deponent firmly believes injustice has been done him.

W. F. SADLER.

Sworn and subscribed before me 8 Dec., 1873.

D. W. WORST, *Proth'y.*

Filed Dec. 8, 1873.

12 FIRST TRIAL.

In the court of common pleas of Cumberland County, Nov. term, 1873.

FANNIE L. GRAHAM
vs.
FIRST NAT. BANK OF CARLISLE, PA. } No. 151. Nov. T., 1873.

Plea non assumpsit; pay't with leave.

By consent this case was put down for trial out of order, and now, 16th January, 1874, jury called.

J. H. Graham & Son, & Henderson & Hays.

Evidence.

CARLISLE, *Oct. 22d*, 1868.

(Heading, &c.)

[First Nat. Bank of Carlisle, Pa. Samuel Hepburn, Pres't, Chas. H. Hepburn, Cash'r.]

CARLISLE, *Oct. 22d*, 1868.

Miss F. L. Graham has left in this bank for safe-keeping four thou-

sand dollars ($4,000), in U. S. $\frac{5}{20}$ bonds of 1867, to be returned on the return of this receipt.

CHAS. H. HEPBURN, *Cas.*

Admitted that the value of the bonds 119\frac{3}{4}$.

Miss FANNIE L. GRAHAM, plaintiff, sw.:

I never received the bonds mentioned in this receipt. I asked
13 Judge Hepburn, the president of the bank, for these bonds mentioned in the certificate, but they were not returned to me.

I reside in Carlisle; the said bank is located in Carlisle. I had first deposited 7.30s, and they were exchanged for 5-20s and these were the exchanged bonds mentioned in the certificate. I gave them to Chas. H. Hepburn, as cashier, who had them exchanged. I deposited them in that bank because Judge Hepburn had been doing business for me and the family. I left them there because they were safer there than in my house. I did not hear that they were gone for three or four weeks after they were gone. I had other bonds deposited in this bank, on an association in Monmouth, Ill's, and my brother who lived in Monmouth that they were notified that the Monmouth bonds were either lost or stolen. Then I went to the bank to inquire about the Monmouth bonds, and Mr. Charles Hepburn told me these Monmouth bonds had been recovered. Then I asked him about the U. S. bonds; he said they were stolen also, but I should say nothing about them and keep quiet; that it was their loss and not mine.

Soon afterwards, not feeling satisfied, I went to the judge. I think Charles said to keep quiet, and in that way they might discover
14 who took them. When I saw the judge he assured me that I should not lose a cent, that they could afford to lose it, and I could not, and said that I should not say anything about it. I saw him a number of times after that and he always assured me I should not lose it, but still gave me no security. They, Charles and the judge, told me to come in and draw my interest. My brother was very anxious to have me secured, and he did not see why the judge would not do so.

I first knew of the loss in Sep. 1871. The judge said, "We are really not responsible for the bonds, but you shall never lose a cent." My brother told me that I could certainly recover the value of the bonds. I generally saw Judge Hepburn in his office. I relied on the whole bank, and the whole concern. I did rely on Judge Hepburn and his responsibility, and had confidence in him until latterly. I sued the bank before I knew that an assignment was made. It had been made, but not recorded. I had asked the judge to secure me, but he always put me off. He said I should never lose a cent; that he had valuable property unincumbered. I told him that something might occur—that he might die, or that I might die. My brother told me that I should not wait a moment until the money was secured to me. He said,
15 "We really are not responsible." I had perfect confidence in Judge Hepburn, and relied on his word.

Charles told me the bonds were taken from the bank in bank hours and in daylight, but they did not know how. He said even if I did die my sons could do exactly as I would do. He said something like this, that he was morally bound, but not legally. The bank never refused to pay the interest.

(Witness' bank-book put in evidence. A. B. & J.)

They continued to credit my account with the interest on the bonds (coupons) same as before their loss, except once; 12 July, 1873, is the

last credit of interest, $136.80, in the handwriting of the cashier of bank.

Book of bank, in which a few pages thereof in rear is used for registering bonds and valuables left for safe keeping, shows 4 bonds U. S. $\frac{5}{20}$'s, Nos. 214567, 214568, 214569, & 23983, of $1,000 each.

Also paper with Nos. of the bonds thereon was given plaintiff by Mr. Orr, clerk in the bank. Paper in evidence.

This bank-book shows that a number of persons made similar deposits of bonds, valuables, and where the receipts of such deposits are taken upon the redelivery of the deposit.

This book, in the main, is a register for notes and drafts received by the bank for collection.

16 Witness says she had been depositing in the bank for some years.

CHAS. H. HEPBURN, swr.:

I was cashier on 22d Oct., 1868, and then the directors were—Jonathan Snyder, Wm. Kerr, Sam'l Hepburn, Isaac Breneman, A. K. Rheene, W. F. Sadler, and Jesse Hetrick.

The directors on 5th Aug., 1871, C. H. Hepburn was cashier, S. Hepburn, se'r, was president; directors were, Sam'l Hepburn, ser. Sam'l Hepburn, jr., Jno. G. Orr, C. H. Hepburn, Hopewell Hepburn, John G. Orr, teller.

C. H., Sam'l Hepburn and Hopewell were sons of Sam'l Hepburn, se'r. Charles H. and Hopewell were living in his family at that time. The stockholders were the same as the directors.

Offer as per paper No. 1, B. F. J., & objection as per same.

17 Per curiam: The offer is to show that the pres. of the bank and the teller actually owned its entire capital, $50,000, on the 9th Nov. 1869, and that these being the only persons' interest in the matter, if their consent is shown that the bonds should be received for safe-keeping, none others can complain.

This is resisted on the ground that the bank being a corporation, acting under its charter, the acts or knowledge of its stockholders cannot bind it; and that even were this not so, the facts offered to be proved do not show that consent; and further, that if there is or was liability for the safe-keeping of these bonds, it was incurred under the old board of 1868.

The assent of the bank officers to receiving the bonds may be shown, and the question still remain open as to whether a national bank, as such, is liable for such special deposits, and the fact that all the stockholders assented may also be shown, and still the question remain open; and as to the time of incurring the liability, it may be considered a continuing one, if incurred in 1868 by the old board—the new board could only escape it by returning the deposit. So that we will admit the evidence as to the ownership of the stock and knowledge of the stockholders and officers of this deposit, and reserve its effect until it is found upon what points the case will turn. If such banks are

18 liable for such deposits, the evidence is admissible, and if it is determined that in no event the bank is liable, the evidence is harmless, and can be withdrawn by the court.

The offer to prove that there was no meeting of the board of directors after 9th Nov., 1869, is material in this, that it shows that the management of the institution was confided to its officers, the president and cashier.

Evidence admitted. Def't excepts, and bill sealed.

B. F. JUNKIN. [SEAL.]

WM. F. SADLER swr.:

I am the receiver of the First Nat'l Bank of Carlisle. I have the care and custody of the effects of the bank & banking room. I believe this book (one containing entries of deposits for safe-keeping and notes, &c., for collection). I promised to produce any books required, without subpœna. The reason why I say I believe it to be a book of the bank is that I see it has entries of drafts, &c., for collection. Some of the entries are in the handwriting of Charles Hepburn, the cashier, some in writing of Orr, the teller, and some, I think, in handwriting of Hoffer, former cashier.

JAMES H. GRAHAM swr.,

CHAS. H. HEPBURN swr.:

19 On 5th Aug., 1871, the stockholders were the same as the directors. Each stockholder owned ten shares, except Samuel Hepburn, sen., who owned 460. Whole number of shares, 500. The last regular meeting of the board of directors was last January, when they were sworn in by the notary, and this was recorded. This entry was not made with day of meeting, but written afterwards. There was no formal meeting nor formal voting. My father's vote would determine the matter. When he and Orr and myself were in the bank together, we considered this a formal meeting of the board.

The record was then made, and oath sent to Washington, to the department.

F. S. DINKLE swr.:

Plaintiff offers to prove by this and other witnesses that they had government bonds on deposit, for safe-keeping, in this bank, &c.; that this was known to the president, cashier, & teller.

It is admitted that U. S. Gov't bonds were received by this bank for safe-keeping, with the knowledge of the president & cashier & teller, and received without compensation; that the bank collected the coupons without compensation; that they were received by the cashier, and that the coupons were sometimes paid to the owner in cash and sometimes deposited to his credit; that coupons were sent by the bank
20 to Phila. for collection, and there credited to the bank and not to the owner of the bond—that is, coupons were collected in the name of the bank, and then the bank either paid the owner the cash or credited his account; that these collections were made at the request of the owner of the bonds.

The minutes of the bank show no meeting of the directors for discount purposes from 8th Feb., 1870, until 1st Oct., 1873, when the board met and resolved to close the bank.

HENRY K. PEFFER swr.:

I have had two or three conversations with Judge Hepburn—the first in 1868 or 1869, and the last along 1870 or 1871, which is most fresh. In 1867, in spring, I opened an account with the First Nat'l Bank, and continued for a year or two. Then I opened an account with Carlisle Deposit Bank, but did not withdraw from the National; and then I met Judge Hepburn upon the square, and he said to me, "We don't see you down at our place."

Plaintiff offers to prove that the president of the bank told witness that he had the whole control of the discounts; that no one would know of the discount but himself, and the whole control and management of the bank.

(Objected to, that this was after the receipts for the bonds had
21 been given, and that the evidence is irrelevant, and cannot in any way affect the liability of the bank; that the action is based upon a receipt for bonds to be returned, and not left for discount or sale.)

Per curiam: We think the objection is well taken. The question trying is as to the failure to return the special deposit of U. S. Gov't bonds left with the bank for safe-keeping in 1868, two years before the conversation occurred, and it cannot aid the jury in the matter trying. It does not relate to the bonds. Evidence rejected. Plaintiff excepts, and bill sealed.

B. F. JUNKIN, *Judge.*

Miss FANNIE GRAHAM recalled:

In conversations with Judge Hepburn, after the bank closed, that it would be opened in a few days; that it was in as good, if not better, condition than any bank in town. He told me several times not to make myself uneasy—that they were perfectly safe; and Mr. Hepburn, the cashier, told me that the bank would more than pay its liabilities, and this he said in the bank, I think. And he said, in rer-
22 erence to the lost bonds, that they were a debt that they had assumed.

At the date of the receipt given by the cashier to the plaintiff, 22d Oct., 1868, Judge Hepburn owned 255 shares of the stock of this bank, and that he became the owner of the balance of the stock he now owns about Nov. 1st, 1869, and in Oct., 1871, Samuel Hepburn, jr., went out, and Henry Hepburn came in.

Plaintiff closes.

Defendant opens.

Sadler opens for defendant.

JOHN G. ORR swr.:

I reside in Carlisle, and became a teller in First Nat. Bank in March, 1865, and remained until Oct., 1873. The first knowledge I had of the Graham bonds a short time after I went there. They were exchanged for the 5-20 bonds lost; they were kept in the safe inside the vault, in an upper shelf in the safe inside the interior iron drawer, and money was kept in the department below the bonds, and these bonds
23 were kept just as we kept the other money and valuables of the bank.

The first I knew of the disappearance of the bonds was in afternoon of 5th Aug'st, 1871. I had been selected as a clerk at delegate election of west ward. A short time before 3 o'clock I went down to the court-house to the election, and after being there a half an hour some one came in and told me that I was wanted up at the First Nat. Bank. I went up, and found Charles Hepburn, the cashier, and Judge Hepburn, the president, there, and the cashier informed me that nearly all the money of the bank had been taken, and asked me if I knew anything about it. I said I did not, and then I went into the vault and found that nearly all the money that was in the safe was gone, except a few packages of 1 and 2 dollar notes. I then returned to the court-house, and told them to get a man in my place, and went back to the bank; and after I had been there I asked the cashier if he had looked to see whether the bonds were there. He said not, and I then went into

the vault and looked, and found that the package of bonds and some other papers were gone. We then examined and found a large pocket-
24 book was also gone. I' this pocket-book were the bonds of the president, cashier, & teller, and some other papers; there was no money in that.

On that morning of 5th Aug'st, 1871, a stranger came into the bank, and after some little conversation he asked me what rate we allowed *we allowed* for money that was left there on deposit. I replied 5 per cent. for 6 months or more. He said that he had several thousand dollars he wanted to leave, and he wanted to know if we would allow him a higher rate of interest. I told him the rules were 5 per cent., and if he wanted a higher rate he must see the cashier, who was then out, and that he should come in again when the cashier was in and see him. In this conversation he stated that he had a ward or some one whom he was going to send to Dickinson College, and would like a large rate, so that the amount would pay his expenses while here. He said he would call again, and he then went out. There was a stranger at the same time standing out in front of the bank and while the other was in. This one outside I saw in the morning at Wetzel's hotel, at breakfast.

After the man left the bank, the cashier came in, and I related the conversation to him. I then went out on business of the bank,
25 and I met this man that I had the conversation with, at Spangler's office, going up towards the bank.

I was absent half hour or so. I saw that there had been a cashier's check issued to the order of Moore for $50 while I was out, and the money must have been received for it, and this check never was presented while I was there, up to Oct., 1873.

There were some papers and some bonds returned afterwards, also certificate of stock. They were brought up to the bank by the cashier.

In ten days or two weeks after, Miss Graham, the plaintiff, came into the bank and stated to the cashier that she had a letter from her brother in regard to the bonds from her brother in Monmouth. After she had drawn the cashier's attention to the matter, she and the cashier went into the directors' room.

Amount of money stolen from the bank was from $3,300 to $3,500.

The special deposits of bonds were not carried into the statement of the bank. There was a statement made every month. They were in no way included in the liabilities of the bank.

I was not in bank when the $50 c'k was given. I was told not say anything about these bonds being taken.

26 In chief.

CHAS. H. HEPBURN swr.

JOHN G. ORR recalled.

Judge Hepburn said it would be better not say anything about it, or it might a run on the bank, or something to that effect. Don't remember seeing the money that morning or that day, but it could not be missing from early in the morning until the afternoon without my knowledge.

C. H. HEPBURN swr.:

These bonds were left with me for safe-keeping; at first they were 7.30s, and we converted them into 5-20s of 1867. She had taken them out of bank at one time, and then brought them back, and left them for safe-keeping, and I gave her that receipt. Those bonds were left in the ori-

ginal envelope in which they came from Washington by express, tied up in a bundle with some other bonds, and other papers left for safe-keeping by other parties.

This bundle was put in the safe, in small apartment above the place we left our money, and all within the small iron door within the
27 safe. This package was always within the safe. The safe is burglar proof Lilly, outside doors fold, with combination lock. The inside of the safe is divided into two departments of shelving. The two upper appartmen's have these small iron doors on them; these again are subdivided. The other apartments are for books. The vault is fire-proof; built of brick with double doors; the internal one is made of this iron, and has a combination lock. The outside door is very heavy, with combination lock.

The bonds were kept there from time received, and that package was never taken out unless called for by parties owning them, or to cut off coupons of those who directed us to sell and collect their interest, and this happened 1 Feb. & July. These bonds remained in the bank until the 5th Aug., 1871, and on the evening of that day, after the bank was closed, it was discovered that the bonds were missing; before this I discovered that the money of the bank was gone. When I came to close the bank I discovered that a package of money was missing. I sent for the teller, and asked him if he knew what had become of it; he said not. In the mean time the pres. of the bank came in, and I informed him that the money was gone, and then I sent for Mr. Orr, and
28 then in looking around it was discovered that the bonds were gone, as also a leather pocket-book, containing deeds, &c., and I never saw or heard of any of these papers or packages until some time the week following Mr. Chenworth called on me and asked me if the bank had lost any papers. I asked him if he had found any. I don't recollect all, but he said he had not found anything, but he knew who had found some packages of papers, and from their contents they believed they belonged to the bank. I told him to bring the papers there, and we would reward them. He did not bring them to the bank, but they were afterwards delivered to a brother of mine, who brought them home.

The bonds were not recovered, except $1,800 of bonds on some association in Monmouth, and title papers of bank. None of those bonds were discovered, the U. S. bonds, except as informed by the Treasury Department, at Washington, as they came in. (Letter of department produced.) There were $3,500 in money taken at same time, and certificate of stock.

After their loss, in consultation with pres. of bank, S. Hepburn, jr., was directed to write letters to the department, &c. We directed him, giving the numbers of the bonds.

29 (Letter of department read.)

When I came up to the bank in the morning, Mr. Orr told me of the stranger who had made inquiry about leaving some money on interest, the teller had gone out on some bank business, and in a few minutes a stranger came in, whom I had never seen; stated that there was a lady at one of the hotels who had a son for whom he was guardian, and said that they wanted to send that son to Dickinson College, that he had some ten thousand dollars which he wished to leave on interest to educate the boy with; had some conversation about the rates; then he asked for a cashier's ck. I went into the safe and took out the book with these checks, and filled him up a check in name of Moore for $50, and he gave me a $50 greenback, and then he left. I saw no more of

him, and that check has never been returned to bank. I noticed, not at the same time, another stranger in bank who asked me to change him a $20, but I did not change it for him, and he left, but they were not in the bank at the same time. The first man was in between 10 & 11 o'clock; that is all I know of that day.

30 These bonds left for safe-keeping were not carried into the statement at all. The directors never inspected these deposits. Since I have been in the bank, no one but the teller and myself took anything out of the bank.

These bonds thus left on deposite were not considered assets of the bank, nor included in the statements to Washington. There was no rule or regulation of any board of directors authorizing such bonds to be received on deposit.

Miss Graham came into the bank eight or ten days after the loss and asked about the bonds. I told her to step into the directors' room, and I then told her that they had been stolen, and that I could not tell how it was done, but that they had been stolen out of the safe. I told her to keep perfectly easy about it, and keep it quiet, so that we might be able to trace the bonds, and in addition to that she should not lose anything; that my father and myself had talked the matter over, and that we would individually pay her every cent of them; that she should call as usual, and we would pay her the interest as heretofore. She has called a number of times since the 5th Aug., 1871, until the bank was closed; sometimes she would speak of them, and sometimes not, and

31 every time she spoke of them I told her substantially the same thing. She called every Jan'y and July ever since, and we paid her the interest right along until including July, 1873. I think I told her at the first conversation that the bank was not liable. There never was any understanding that the bank should be liable. The very first time I saw her I told her we would make it an individual matter, and we have acted on it ever since.

We received no compensation for the keeping of the bonds, nor for collecting the coupons. The first I saw of the pocket-book after the loss was at the house; think Samuel Hepburn, jr., brought it there from Todd's office; it was lying in the parlor when I first saw it; I think my father was there; I told Cheneworth not to say anything about it; I did not tell Dinkle that this cashier's check I gave the stranger he left lying on the counter, never told him about the c'k.

(Plaintiff proposes to show by witness that one Denkle and others had bonds in the bank which were also missing at some time, and that they were not informed of the loss for over two years, and that the

32 cashier of the bank gave a receipt to Deurcle for a bond of $100, dated 1st Jan'y, 1873, for the bond which had been missing for over two years, thus showing that the owner of the missing bonds received no information from the bailee in these cases until the bank was closed.

(Objected to that anything done by the cashier in reference to other owners of missing bonds, and the concealment of their loss, cannot affect the particular case trying; eachmust depend upon its own circumstances.)

Per curiam: The objection is sustained; the materiality of the evidence could only be in showing that the cashier suppressed the fact of the loss of the bonds, and concealed the loss from the owners, and in each particular case it is admissible to show negligence or injury in preventing the owner from pursuing the steps which might have been taken for their recovery. But we have already admitted the evidence

of the concealment of the loss in the particular case trying, and that is all that it is material for the jury to know or proper to be received.

Evidence rejected and plaintiff excepts & bill sealed.

[SEAL.] B. F. JUNKIN.

33 Witness has already testified in detail, in chief, that other bonds and valuables were missing at the same time the ones in suit disappeared. Plaintiff now proposes to ask him if any of these parties were ever notified of the loss of their valuables, and also whether they continued to draw their interest on bonds regularly, and never knew that bonds were gone until after bank closed, and this for the purpose of showing the conduct of bank officers and to charge them with negligence.

Per curiam: All this is already in evidence by the testimony of the cashier, so that really the plaintiff has already all she asked; but upon the principle it is inadmissible for the inquiry here is the care taken of the plaintiff's deposite, the bailee to give notice to her, and their own failure to institute measures for the recovery of the missing bonds, and this is all that can be material in this case, and this has been admitted.

Evidence rejected. Plaintiff excepts & bill sealed.

[SEAL.] B. F. JUNKIN.

34 (Witness resumes:)

The pocket-book contained the bonds of the officers of the bank, and the envelope which had contained the gov't bonds was inside this pocket-book, some certificates of railroad stock, policy of insurance. Think also there were receipts of the U. S. Dep't, &c., for the bonds deposited to secure the circulation of the bank.

I am positive the bonds were taken on the fifth of August, and not before; and I am sure I saw them, although I cannot positively swear to it.

I did not miss the bonds at all, until Mr. Orr discovered it. When closing the bank I generally put the money in the lower part, and my attention would be entirely given to the lower part, I never thought of the bonds when I discovered the money gone, but saw a boy on the street, called him, and sent for Mr. Orr. Judge Hepburn came in, and came in behind the counter, and asked me to change a bill just as the strange man went out; he remained about five minutes; this was between ten and eleven o'clock.

35 From the far end of the counter you can see pretty well into the vault & safe, but near to the vault you cannot. At the cashier's table you can see into the vault. Cheneworth came in at the end of the following week, after bonds were missing. I did not then tell Cheneworth that they had been missing about three weeks; think he was there only once.

We employed no detectives to search, &c., nor gave any description of the parties, nor notified any of the banks in town.

I notified Miss Graham, the plaintiff, 8 or 10 days after, when she came into the bank. She asked me about the bonds; don't recollect how long they had been missing.

When they were found to be gone, the president remarked that it would not do to let the plaintiff to lose it, and we individually assumed the loss.

The president concluded on Monday morning to go to Harrisburg and see Mr. Weir. Draft of banking room vault and so forth shows the

outside shutters of bank room were bowed together; can't say whether the door from directors' room to passage to vault was open or closed. I faced the counter when at the cashier's table. When talking to
36 this strange man, I was at the opening of the counter next to the street. This door from directors' room was not locked during banking hours. No evidence of force; the doors of vault and safe, inner and outer doors of safe were open. The packet of bonds were not in the pocket-book. There was no screen over the near window in the directors' room. This room had been used as a banking room for some years. The First Nat'l Bank built the vault; it organized in fall of 1863.

WORLEY MATHEWS swr.:

I found this book, or one like it. I was quarrying stone at Bridgeport for railroad, and found it near that place; found it fifth Aug., 1871, between 12 and 1 o'clock, the train passing a few minutes before 12 o'clock. I gave it to young Samuel Hepburn one week after I found it. The package came down on the mail train a few minutes before 12 m., of Aug. 5, 1871.

CHAS. H. HEPBURN recalled:

37 Never saw a blue bag about the bank; it had no wrappings around it when in the bank.

Miss F. GRAHAM recalled:

The letter I received from my brother is both dated and mailed 18 Aug., 1871, but it was received several days after, for I was sick and not at the office.

(Defendant offers letters O & P (B. & J.), written by the plaintiff's brother, Samuel A. Graham, to her, 24 April, 1872, and 9 May, 1872, for the purpose of corroborating Charles Hepburn, that he notified the plaintiff that the bank was not responsible, also to show the recognition of Miss Graham herself that the bank was not the bailee of the deposit. Objected to, &c.)

Per curiam: Having read the letter, we think they are inadmissible, as it is no more than the advice of her brother, directing her what to do; one to her and in answer to her, and the other is an answer to
38 some letter written to him by some other person and is clearly immaterial. He' own opinion or her brother's cannot affect the issue. Rejected.

Defendant excepts, and bill sealed.

[SEAL.] B. F. JUNKIN.

Defendant rests.

Plaintiff rebuts.

WM. B. CHENEWORTH swr.:

I was called in by Mathews to examine the pocket book, &c. I went into Hepburn's bank and saw Charles, and I asked him if he had lost anything out of the bank, and he asked me into back room, and he asked me if I had found anything. I said not, but knew a man who had a pocket-book. He asked me if I said anything, &c. He said for God's sake say no more about it. Bring it to him, and he will pay me well. I asked him if he knew how it got away, and he said he did not, but they had missed it some two or three weeks.

The c'k was not cancelled.

JNO. G. ORR recalled:

39 There was nothing said.

(Offer of plaintiff as per paper AA, B. F. J., and objection as per same.)

Per curiam: An informal meeting of the pres., cashier, and teller of the bank at the private house of the president could not be a meeting of the board, and anything they might there agree upon to assume the payment of the loss could not affect the corporation.

The evidence is rejected as a meeting of its officers as a board of directors, but admitted so far as it was there agreed to keep the matter of the loss a secret.

Plaintiff excepts and bill sealed.

[SEAL.] B. F. JUNKIN.

(Witness resumed:)

The president and cashier concluded at the meeting at the president's private house that it would be better to say nothing about the loss; that the amount of bonds and money missing was large, and might be injurious to the bank. I think Hopewell Hepburn was there; don't think Samuel was.

40 (Offer as per paper BB, B. F. J., and objected to as per same.)

Per curiam: We think the evidence is admissible for the purpose offered. If plaintiff can show that there were no bonds taken, the defendants' liability becomes clear, and whatever supports this theory is admissible.

Evidence admitted, defendants except, and bill sealed.

[SEAL.] B. F. JUNKIN.

Mr. TRUSS swr.:

I had bonds in this bank, and received a receipt for them, and drew interest up to July, 1873. I only heard of the loss after the suspension. Charles said I should not lose. Am't, $250 in bonds, $100 on deposit.

F. S. DINKLE recalled:

The following evidence admitted under the preceding exceptions:

(Witness resumes:)

On Jan'y 5th, 1871, I got one hundred dollars off a five hun-

41 dred dollar bond. In 21st March, 1870, he put in $500 in bonds. Then 5th Jan'y, 1871, he put in $200 in bonds. Then 15th Nov., 1871, he got $200 in money. Then he got $100 in money. I received all my money but one hundred dollars. I did not hear of the loss of the bonds until after the bank had closed.

(Articles of association put in evidence.)

Miss GRAHAM recalled:

Charles Hepburn, in 1871, when I was first there and discovered the loss, he said it was their loss, and not mine.

Evidence closed.

42 *Charge of the court to the jury.*

On the 22d Oct., 1868, the plaintiff left with the cashier of the First Nat. Bank of Carlisle, at the banking-house, four 5-20 U. S. Gov't bonds for safe keeping, to be returned on the return of the receipt then given

by the cashier. The numbers of the bonds were 214567, 214563, 214569, & 23983, of $1,000 each, in all $4,000. No compensation was to be received for the care of this deposit by the bank. It was, therefore, a naked bailment, without reward, and without any special undertaking, which in the civil and common law is called, what this really was, depositum; the bailee will be answerable only for gross negligence, which is considered equivalent to a breach of faith, as every one who receives the goods of another in deposit impliedly stipulates that he will take some degree of care of them.

The degree of care which is necessary to avoid the imputation of bad faith is measured by the carefulness which the depositary uses towards his own property of a similar kind. So that the doctrine may be regarded as well settled upon authority and reason that where one makes a simple deposit, in which there is an accommodation to the party making it, and the advantage is to him alone, he shall be the loser,
43 unless the person to whom he entrusted the deposit has shown bad faith in exposing the goods to hazards to which an ordinarily prudent man would not expose his own; and only when it is shown that the bailee has kept the goods or deposit in such manner as no ordinarily prudent man would keep his own is he guilty of gross negligence, and only when this is shown is he guilty of such neglect as renders him liable for value.

Gross negligence is the omission of those precautions which persons of common care and common prudence would naturally adopt, even though they might in reference to their own goods omit them; so that the test of gross negligence is not simply did the bailee take as much care to preserve from loss the property bailed as he did of his own, but did he take that kind of care which persons of common care (customary care) do take of their own.

Good faith requires that the bailee should take reasonable care of the deposit, and what is reasonable care must materially depend upon the nature, value, and quality of the thing, and the circumstances under which it is deposited, and upon the character and confidence and particular dealings of the parties. He is bound to exercise a degree of care proportioned to the nature and value of the article, the damages of loss, and the temptations to theft; and if he take the same
44 care of the goods bailed as he does or did of his own, that will ordinarily repel the presumption of gross negligence. The desire to preserve one's own property from loss from any cause is, as a rule, so universal, that the mind rests with satisfaction upon that evidence which shows the same care of the bailed property that the bailee took to save his own, unless it is shown that he was grossly negligent of both; and when this is done he is not excused, but held answerable.

With these simple rules for your guidance we will do what we can to aid you in their application to this case.

The deposit in this case was not money, but U. S. bonds, so that the bank thus receiving them could derive no profit or benefit therefrom.

When money is deposited in a bank to the credit of the depositor it becomes the property of the bank, and the bank becomes debtor to the depositor to the amount; and if the money thus deposited is stolen, the loss falls on the bank, because it is their money. But a special deposit of a bundle of money, or of bonds, or a jewel, does not transfer the title in the particular thing to the receiving bank; on the contrary, the title remains in the depositor, so that such special deposit is at the risk of the owner, unless it is shown that the bank's officers, having the care of the deposit, have acted in its preservation in a manner which

45 was grossly negligent, that is, so carelessly that men of ordinary care would not so have acted and done.

Whether at any time it should have been held that banks, being neither warehousemen nor common carriers, should as corporations be held answerable for the receipt and safe-keeping of that which in no sense ever was the property of the corporation, nor within the scope and compass of their business, may not now be questioned since the case of Foster's Ex. vs. The Essex Bank, 17 Mas., 479; Lancaster Nat. Bank vs. Smith, 12 Smith, 47, and others. It would seem that where the special deposits are received by the cashier and other officers of the bank, and this is known to the directors, and the practice continued for years, the consent of the corporators and stockholders is inferred. (17 Mass., 479.)

In the case at the bar it appears that these four $1,000 5 20 bonds belonging to the plaintiff were kept in the inside of the safe within the vault, and were kept in an envelope within an iron department of the safe, closed by a locked iron door, and in this same place the money of the bank was kept up until the 5th August, 1871, and on that day disappeared along with other papers and a sum of money in currency ranging from $3,300 to $3,500; that the money was missed when the

46 cashier came to close the bank in the afternoon about 5 o'clock, who sent for the teller, Mr. Orr, who, upon examination, found that the envelope containing the bonds, as well as a pocket-book containing papers, &c., were also missing.

The cashier believes that the envelope was there the day before, and also in the morning when he opened the bank on the 5th Aug., from the fact that the $3,300 in money was there, and the package of bonds was on the shelf just immediately above the money; that, had it been gone, he must have observed it.

He further states that on that day in the forenoon a man called first on Mr. Orr, the teller, in the absence of the cashier, and spoke of depositing $10,000, and wished to know the rates of interest which would be allowed; was told that he must see the cashier; that when the cashier came in the teller left; and a short distance from the bank he met this strange man going towards the bank; then the cashier states that this stranger did come into the bank and renewed the inquiry as to what interest would be allowed on a $10,000 deposit; said that he was guardian of a boy, whose mother was at a hotel in Carlisle, and they wished to send the boy to college, and the interest on the proposed deposit was to be applied to his maintainance.

47 Then he asked for a cashier's check, which was given him, for $50; he paid down a $50 greenback and left, and that this check has never been presented for payment; nor did the man himself again appear; that while the stranger was in the bank thus engaged another stranger was seen looking in at the window.

A draft of the banking room, with the vaults, &c., has been laid before you, and you will have that out with you.

It appears from this draft that there are portions of the space behind the counter from which the door of the vault cannot be seen by a person engaged in business with customers, and it is the theory of the defence that, while the one stranger was engaging the cashier in negotiating for interest on a proposed deposit of $10,000, the other, in some way unobserved by the cashier, succeeded in gaining access to the safe within the vault and abstracted the $3,300 and the missing bonds.

Then, it is clearly established that, about 12 o'clock m. of that same 5th Aug., 1871, near the Susquehanna River, 17 or 18 miles from the place of the robbery, along the railroad, was found by Mr. Mathews the large pocket-book which had also disappeared from the safe along with the bonds and money, very peculiarly wrapped up and bound about, with the evident purpose of concealment. It was large, and any
48 thief, in order to carry it, would be obliged to conceal it in some way from the observation of passengers in the cars, and it cannot be doubted that the wrappings were intended for that purpose. Here, then, is a fact which is difficult to explain on any other theory than that the bank was robbed of this pocket-book at least, and that it was done by a stranger, who left on the very first train which passed through town.

The evidence offered to repel the alleged theft is the fact that Dunkle and Mrs. Croft, who had bonds in this bank, went there and drew their interest as before. Dunkle had $700 in bonds, and, from time to time, kept lifting them, by the bank paying him the cash for them, the same as if the bonds were still there. But he saw no bonds; he was paid money. The explanation offered for this apparent inconsistency is this, that, after the loss was discovered, the Messrs. Hepburn, in consultation, resolved to assume the loss, and kept it quiet, lest the bank would be run upon.

Now, does this account for what otherwise seems unaccountable, and explain why they continued to treat the bond-owners just as they had done before?

Again, it is argued that there was negligence in the structure of the rooms of the banking house, and the vault was so located that a theft could be committed without the cashier seeing it. But does the construction (of this banking room) show gross negligence?
49 The vault and its entrance were, as nearly as practicable, under the eye of the officers, and it had been a banking-room for many years; and the plaintiff is supposed, from her frequent visits and her deposit, to have deemed it reasonably secure. It would have been a novel proceeding to allow a voluntary depositor, who required her bonds to be safely kept for nothing, to charge the depositee with an insufficient vault for that purpose. Such person should go elsewhere, until the proper safeguards were found, or pay a trust company for keeping such valuables, and several such exist. If it is to be done without compensation, the law only requires ordinary care.

Should you find this to be the truth of the case, and that there was a larceny of the plaintiff's bonds on that 5th day of Aug., 1871, and that thus the bonds were lost, with no gross negligence on the part of the officers of the bank having the care of its deposits, this plaintiff should not recover, unless, however, that it is found that the plaintiff was prejudiced by the neglect of the bank to give her immediate notice of the loss, as we will hereafter explain more fully.

It is clear that the plaintiff's bonds were kept in the inner iron box within the safe, which itself was within the vault in the same
50 place and under the security that the money and valuables of the bank were kept. More than this could not be expected with reason, and more than this the plaintiff could not expect, as she paid nothing for the security, and the bank was not an insurer. The bank was not bound, from the nature of the relation between it and the plaintiff, to resort to extraordinary measures to secure her bonds, but only to keep them with ordinary and customary care, as ordinarily careful persons keep the like kind of property.

All owners of bonds or money or valuables, in fact of all worldly treasure, are thus exposed, where thieves do break through and steal; all worldly wealth is fleeting; los'es are constantly occurring, and the only rule of accountability that the law can administer is to convince the judgment that the loss is attributable to the fault or negligence of another, on whom the duty of care rested, and then it intervenes to shift the burden. Without such evidence, "all that a court and jury can do is to lament the common misfortune, and take care not to add injustice to hardship by relieving one sufferer at the expense of others, unless the principles of law demand such interposition."

Should no gross negligence be found by you on the part of the defendant in caring for the plaintiff's bonds, then you must look
51 into the effect of the neglect on the part of the defendant to give this lady immediate notice of the loss.

The rule of law is that where the bailee accounts for a loss in a way not to implicate himself in a charge of negligence, this is a sufficient defence, unless plaintiff proves negligence. (Bickman vs. Shouse, 5 Rawle, 179; Fanham vs. C. A. R. R. Co., 5 Smith, 53; Clark vs. Spence, 9 Watts, 337.)

Now what is the precise effect of the failure of the bailee to give the bailor notice of the loss? My first impression was that it might be treated as absolute proof of negligence, but on careful reflection it seems to me that this would be carrying the inference too far, and that reason requires that it should be limited to raising a presumption of negligence, which presumption may be repelled and rebutted. But even when repelled and rebutted, it still remains a question for the jury to determine whether any injury resulted to the plaintiff from the neglect of the defendant to give her notice of the loss. If you are satisfied that the bank from prudential motives, either from the honest belief that publicity would diminish the chances of the recovery of the bonds, &c., or from a fear that there might be a panic among the depositors,
52 or from both, and this resulted in no injury to this lady by preventing her from adopting measures for their recovery, then we see nothing in the want of notice which would render the bank liable. If, however, there was a reasonable probability that her own efforts would have resulted to her advantage in the recovery of the bonds, and thus injury resulted to her, then the bank is liable; she should recover.

Is it probable that she herself could have been more successful in her efforts in this direction than the bank? This is an important inquiry; and if it is reasonably certain to your minds that this lady would have recovered the property had the loss been immediately made known to her, the neglect of the bank to give the notice would make the defendant liable. If, on the other hand, no such benefit would have been likely to result to her from such notice, we do not see that the failure to give it should per se render the bank liable, and it would be injustice to hold the latter to responsibility for that which, if given, would have been fruitless to the plaintiff.

And, furthermore, should you find that had the bank itself taken more efficient measures to advertise the loss, employing detectives, &c., and there was a reasonable probability that the loss would have been recovered, that should make them liable. In considering these proba-
53 bilities, you should remember what the chances are of detecting the thieves and recovering the stolen property—that it is only successful under the most favorable circumstances, and the instances are not frequent. Sometimes publicity only diminishes the chances of success, and it is generally difficult to know what course to pursue.

You must exercise your judgment here as best you can, and with the honest desire to do no injustice; laying aside all sympathy in behalf of the plaintiff for her misfortune, and governing yourselves by the law and the evidence only. This as true and lawful men you will do, and thereby receive the approval of your own consciences.

Both parties except to the charge, and this bill sealed.

[SEAL.] B. F. JUNKIN.

54 *Plaintiff's points.*

In the court of common pleas of Cumberland County.

MISS FANNIE GRAHAM
vs.
FIRST NAT. BANK OF CARLISLE, PA.

The court are respectfully requested to charge the jury in this case:

1st. If the jury believes that the plaintiff deposited the bonds, for the value of which this suit is brought, with the defendant for safe-keeping, and took the receipt of the cashier in evidence for the same, the defendant was bound to exercise ordinary care, skill and diligence to keep and return the same safely, such care as men by ordinary prudence exercise in the care of their own property, and if afterwards did not use ordinary care to keep plaintiff's bonds safely, but kept the same negligently, then it is liable for this loss, and the plaintiff is entitled to recover their value.

2d. It is the duty of the defendant satisfactorily to account for the plaintiff's bonds, and if defendant has failed to give any satisfactory account of the disposition or loss of plaintiff's bonds in its custody, it is liable to the plaintiff for their value.

55 3d. If defendant was negligent, and did not exercise ordinary care, skill, and caution to keep plaintiff's bonds safely, then it is liable for their value, no matter how negligent it may have been in taking care of its own property.

4th. If plaintiff's bonds were deposited in bank for safe-keeping, and Charles Hepburn, the cashier, gave plaintiff a receipt for said bonds for safe-keeping, and the bonds were lost or stolen through the negligence of the bank officers, the bank is liable to the plaintiff for their loss.

5th. If the deposit of government bonds in bank for safe-keeping was known to Judge Hepburn, the president, his son Charles Hepburn, the cash, and John Orr, the teller in said bank, three of the five directors of said bank, and who owned all the stock of said bank except $2,000, $1,000 of which was in the name of Hope. Hepburn, and $1,000 in the name of Harry Hepburn, a minor, both sons of Judge Hepburn, and who lived in his family, and were the remaining two of the five directors of said bank, and if the bank was in the habit of receiving Gov't bonds and other valuables for safe-keeping and collecting the coupons, under these circumstances the bank would be liable for such bonds lost

56 or stolen through the negligence of its officers.

6th. If the jury believe that Judge Hepburn owned the entire stock of said bank ($50,000), and assigned ten shares to Mr. Orr, the teller, and ten shares to each of his three sons, Charles, Hope., & Harry, and the assignment to his sons was a mere sham to enable him to elect them directors and thus keep up the appearance of a board of directors to comply with the law, when in truth and in fact he owned all the stock, and exercised the entire control and management of the bank, if he

knew of the deposit of bonds for safe-keeping and the collection of coupons by the bank, or had the means of such knowledge from the books of the bank of which he was president, the bank would be liable for the loss of bonds deposited for safe-keeping, through the negligence of its officers, and the pl'ff entitled to recover.

7th. If the jury believe that the defendant endeavored studiously to conceal the loss of pl'ff's bonds and did not inform her of their loss, although living in the same town, for some weeks afterwards, and then enjoined silence upon her by stating she should lose nothing, that
57 it would be defendant's loss, not pl'ff's, and made no attempt to discover the alleged thief except by procuring its attorney to write to Government officers in Washington and New York, and did not telegraph or write to any bankers or brokers in Pennsylvania, this is strong evidence of negligence on the part of the bank, and proper to be taken into consideration by the jury on the question of negligence.

8th. Chas. H. Hepburn having in his official character as cashier of the defendant corporation received on deposit in the bank for safe-keeping the bonds of the plaintiff, and it being in evidence that the bank adopted or recognized the acts of its officers in this respect by paying the value of bonds to other parties deposited in bank in like manner, and alleged to have been lost as the bonds of the plaintiff were lost, the defendant cannot now shield itself under any want of authority in the cashier so to receive said bonds on deposit, particularly as the plaintiff had not the same means of knowing the authority of the said cashier.

58 *Answers to plaintiff's points.*

FIRST POINT.—Affirmed, and for the meaning of gross negligence the jury is referred to the general charge.

SECOND POINT.—Affirmed, with this qualification, that the defendant is not bound to show satisfactorily how the bonds were lost, but simply to show satisfactorily that they were lost, and that not by the gross neglect of the defendant. 11 Cushing, 72 to 79.

THIRD POINT.—Affirmed; see general charge.

FOURTH POINT.—Affirmed, except that the bank is not liable unless the negligence inducing the loss was gross.

FIFTH POINT.—If it was known to the officers and directors of the bank that bonds were left there for safe-keeping, although not in the line of the business of a bank, the latter is liable where the loss
59 occurs through gross negligence of those entrusted with the valuables of the bank.

SIXTH POINT.—We have already said in answer to the last point that the reception of bonds on special deposit, if known to the directors and not forbidden, it is fair to presume they were received with the assent of the directors, and it does not matter whether Judge Hepburn owned nearly all the stock or not, so that we cannot see the *mat*riality of the fact as to what part of the stock the president of the bank owned. The bank is a corporation, and we must deal with it as such.

SEVENTH POINT.—This point is affirmed. We have fully instructed you on this branch of the case, in the general charge.

EIGHTH POINT.—We have said that if these special deposits were received with the knowledge of the directors, and they were suffered to remain there, there would be a fair presumption that they were received with the approbation of the directors, and the bank would be liable
60 under these circumstances, if they were so grossly negligently kept that their loss ensued.

Defendant's points.

GRAHAM
vs.
FIRST NAT. BANK CARLISLE.

1st. If the plaintiff after receiving notice of the loss of the bonds was told that the bank was not responsible for them, but Judge Hepburn and Chas. H. Hepburn agreed to be personally responsible for them, and that they would personally pay her the interest from time to time, and she accepted their responsibility, and acted upon this understanding, and did, from time to time, receive the interest from Chas. H. Hepburn, and made for more than two years no legal claim against the bank, waiting until Judge Hepburn had become embarrassed in financial matters and had made an assignment, she is estopped by her own acts and acquiescence, and cannot now set up her claim against the
61 bank, and the detriment of the creditors thereof.

2d. That the First Nat. Bank of Carlisle, Pa., being a corporation chartered under the act of Congress passed the day of , A. D. 186 , and the several supplements thereto, and the objects, powers, and duties of said corporation being thereby defined, and no power being thereby given authorizing or permitting it to become a bailee, or depositary of valuables in the manner alleged by pl'ff, the act of the cashier in so receiving such valuables would not make the bank liable to the plaintiff, and she cannot recover.

3d. Even if the bank could legally be a bailee for a deposit of the kind in suit, to make the bank liable, as a corporation, the plaintiff must make out a custom on the part of the cashier with the knowledge and consent of the directors to receive such deposits for safe-keeping, and if she has failed to bring home to the said directors such knowledge and assent the defendant is entitled to a verdict.

4th. Even if the bank could legally become a bailee as alleged by plaintiff, the proof being clear that no compensation was paid for keeping it, and that it was taken and kept at the request of the plaintiff for her convenience, the plaintiff cannot recover unless she shows that
62 the defendant was guilty of gross negligence; and the test of good faith and want of gross negligence is, did the bank keep the deposit with the same care and security as it did its own property?

5th. That the written receipt given at the time of the deposit of the bonds is not to be construed in any way as an express promise or engagement on the part of the bank to safely keep and return the same, and under it the bank is no more liable than if the bonds had been received without giving said receipt.

6th. If the defendant shows that the loss occurred without gross negligence on his part, that is all he is required to prove. He is not required to prove the exact manner in which it occurred.

8th. If the plaintiff after being informed of the loss of the bonds acquiesced in the silence of the officers of the bank as to the loss, and concurred therein, she is guilty of concurrent negligence, and cannot recover upon the ground that the bank did not give notice of the loss.

63 *Answer to defendant' points.*

TO FIRST POINT.—If in fact, the bank from gross negligence had become liable, and this plaintiff instead of holding the bank to its responsibility, agreed with Judge Hepburn to accept him personally as

the debtor, the point would be correct. But this should be very clearly shown, and it is certainly not shown, with even plausibility in this case, and we see nothing in the evidence to justify you in finding the fact as stated in the point.

TO SECOND POINT.—We have already told you that the bank is liable only where these special deposits are received from time to time with the knowledge of its directors. If they were so received in this case, the bank is liable, if gross negligence has been shown.

TO THIRD POINT.—This point is the same as those already answered. Unless it is shown that the special deposits were received in accordance with the custom of the bank, and the knowledge of the directors, the bank is not liable.

64 TO THE FOURTH POINT.—Affirmed, except that the deposit must be kept with the same care that an ordinary prudent man would keep his own of like kind and value.

Fifth point withdrawn.

TO THE SIXTH POINT.—Affirmed.

TO THE SEVENTH POINT.—Affirmed.

TO THE EIGHTH POINT.—We cannot answer as requested. Her agreeing to keep silence is not concurrent negligence in the sense of that term. The effect of inducing her to keep silence cannot affect the questions in which the case turns. It is a question of gross negligence on the part of the bank, and she could do nothing by her agreement to maintain silence which could affect the question of gross negligence.

65 *Motion for a new trial.*

Common pleas of Cumberland County.

FANNIE GRAHAM
vs.
FIRST NAT'L BANK OF CARLISLE, PA.

The defendant respectfully moves for a new trial, and files the following reasons therefor:

1st. The court erred in admitting the testimony of Fred'k Dunkle and Mrs. Trout in reference to what was done by the bank in the loss of the bonds of said witnesses.

2d. The court erred in not instructing the jury as requested by deft's second point, that the act of Congress instituting national banks gave no power to receive such deposits, and that the bank could not legally enter into a contract of the kind relied upon by the plaintiff.

3d. The court seem to have misapprehended the meaning and force of the defendant's eighth point, which should have been answered differently from the answer given thereto by the court.

4th. The court overlooked and neglected to answer the ninth point presented by the def't.

66 5th. The counsel for the plaintiff, who made the concluding argument to the jury, asserted to the jury what was not in evidence in the cause, viz: that the bank was insolvent at the time of the loss of the bonds, and that these bonds were appropriated by the bank for its own use and benefit, which statement, the defendant is informed, had great weight with the jury.

6th. The jurors seem to have misunderstood the charge of the court in reference to the force of want of notice of the loss of the bonds, they under-

standing the court to say that such want of notice was negligence, and would render the def't liable.

7th. The def't has important evidence bearing strongly upon the transactions and conversations with the plaintiff, and upon the question of notice of the loss, which evidence he was unable at the previous trial to produce.

8th. The verdict of the jury was clearly against the evidence in the cause, and against the law, as clearly and conclusively set forth in the charge of the court.

W. F. SADLER,
C. E. McLAUGHLIN,
Att's Def'ts.

67 GRAHAM
vs.
THE FIRST NAT. BANK CARLISLE, PA.

Counsel for defendant ask leave to file the following additional reasons for a new trial in the above case:

The counsel for the plaintiff, who closed the discussion to the jury, argued the case, not upon the evidence given in the cause, but upon an alleged state of facts which he asserted to exist, which did not exist in truth, but which was wholly imaginary, unfounded in fact, and unwarranted by any testimony in the cause; in that he asserted: That none of the creditors of the bank were opposed to this claim; that not a single creditor objected to its payment; that the bank was insolvent at the time of the loss of these bonds; and that the bonds had been appropriated by the bank for its own benefit; that the books of the bank would show these assertions to be true, but that *that* these books had been concealed from the pl't'ff; together with other assertions equally unfounded in fact, unwarranted by the evidence, and calculated to prejudice the minds of the jury in an action of this character.

S. HEPBURN, JR.,
W. F. SADLER,
C. E. McLAUGHLIN,
Att'ys for Def't.

(Endorsed:) Filed by leave of court Jan. 23, '74.

68 *Motion for new trial.*

In court of common pleas of Cumberland County, Pa.

GRAHAM
vs.
FIRST NAT. BANK OF CARLISLE, PA. } No. 151, Nov. T., 1873.

Per curiam:

First reason, viz: Admitting offer B. B., B. F. J. One of the questions was, did the bank suffer from robbery? Plaintiff denied it, and in support of her allegation—it was competent to show that Dunkle's bonds, which were alleged to have been taken also in the same package, were in fact paid by the bank, without complaint of their loss, and was thus evidence, however slight, to go to the jury. It was twice rejected until the purpose of the offer was indicated, then admitted.

Second reason. The court was correct.

Third reason. The court was asked to instruct the jury, that after a delay of from two to three weeks, to give plaintiff notice of the loss of her bonds, and after she had discovered it through others, she did, upon the promise of being made whole, acquiesce in keeping the robbery secret; that this was concurrent negligence; and we refused, but told the jury that it was a question of gross negligence, and that she had not by such agreement contributed. Whatever of injury she had sustained for want of notice was past remedy at the end of over two weeks, and we regarded her promise to keep the loss secret at the time she made it as of no consequence, as pursuit then was manifestly out of the question. If the bank had been guilty of gross negligence it was liable before she made the promise.

69

Fourth. That the court neglected to answer def't's ninth point. If there was such a point, we never saw it, and it was the duty of counsel to draw the attention of the court at the time to the neglect, which was not done, but instead they have taken the chances of a verdict and now complain. It is too late.

Fifth. The court was very careful to brush away every outside influence brought to bear by counsel, and took especial pains that the jury should be governed by the evidence, and it is not believed that the remarks of the concluding counsel for plaintiff in any manner influenced the jury, and this disposes of the supplemental reason filed.

Sixth. That the jury misunderstood the charge of the court on the question of the want of notice of loss to the plaintiff. This is impossible; they were out a long time, and if they had understood the court as charging that the want of notice, per se, made the bank liable, they need not have left the box.

70

Seventh. That defendant has evidence not produced; known at the time but could not be had. Had there been an application for a continuance on this ground we would have granted it, but it is no reason for a new trial.

Eighth. That the verdict is against the evidence and the charge. We cannot say that it is. There were many strange circumstances in the case, difficult to account for, and all these were to be weighed by the jury. The court was very guarded in drawing the attention of the jury to the main features of the case, and did all in its power to keep them in the line of the testimony, with no unfavorable comments so far as the defence was concerned, and we do not feel justified in setting aside the verdict. If we have erred in the law we will be corrected.

Motion for new trial overruled.

Judgment & verdict.

In the court of common pleas of Cumberland County, Nov. term, 1873.

FANNIE L. GRAHAM
vs.
FIRST NATIONAL BANK OF CARLISLE. } No. 151.

And now, to wit, Jan. 6th, 1874, jury called, &c., who being severally ballotted for, elected, empannelled, sworn, and affirmed, do say that they find for the plaintiff four thousand seven hundred & ninety dollars damages.

Aug. 24th, 1874. Judgment.

72 Among the records and proceeding of the supreme court of Pennsylvania, sitting in and for the middle district at Harrisburg, to May term, 1875, No. 72, it is contained as follows:

Docket entries.

THE FIRST NATIONAL BANK OF CARLISLE, PA., pl'ff in error & defendant below,
vs.
FANNIE L. GRAHAM, DEF'T IN ERROR & PLAINTIFF below.

Writ of error to the court of common pleas of Cumberland County, No. 151, Nov. term, 1873.

Feb'y 1, 1875—Præcipe & affidavit for writ of error filed eo die. Exit writ of error. R't'ble 2d Monday of May, 1875.

May 10, 1875.—Assignments of error filed eo die. Record returned and filed.

May 26—Called for argument & argued.

And now, to wit, Oct. 13, 1875, judgment reversed and a venire facias de novo awarded.

Opinion by Woodward, J.

Certified from the record.

Harrisburg, Pa., July 30, 1877.

[SEAL OF SUP. C'T OF PENN'A MID. DIST.] ROB'T SNODGRASS,
Prothonotary.

73 In the supreme court of Pennsylvania for the middle district.

FIRST NATIONAL BANK OF CARLISLE, PA., defenda't below, plaintiff in error,
vs.
FANNIE L. GRAHAM, PL'FF BELOW, DEfendant in error.

Issue writ of error to the court of common pleas of Cumberland County to bring up the record and proceedings in a certain case depending therein to No. 151 of Nov. term *term*, 1873, returnable to May term, 187 .

W. F. SADLER,
Attorney for Plaintiff in Error.

To proth'y supreme court of Pa., middle district.

CUMBERLAND COUNTY, *ss:*

W. F. Sadler, receiver of the 1st National Bank, Carlisle, Pa., the above named plaintiff in error, being duly sworn according to law, deposes and says that the writ of error in this case is not intended for delay.

W. F. SADLER.

Sworn, subscribed before me this 31 day of Jan'y, 187 .

D. W. WORST,
Proth'y and Common P. Clerk.

(Endorsed:) No. 72. May T., 1875. Filed Feb. 1st, 1875.

74 In the supreme court of Pennsylvania in and for the middle district, set:

The Commonwealth of Pennsylvania to the justices of the court of common pleas for the county of Cumberland, greeting:

Because in the record and process, and in rendering the judgment in a certain plaint, which was in our said court before the judges of the same court by our writ between First National Bank of Carlisle, Pa., plaintiff in error, and Fannie L. Graham, defendant in error (No. 151, Nov. T., 1873), as it is said, manifest error hath intervened, to the great damage of the said plaintiff in error, as by the complaint of the same plaintiff in error we have received information, we, willing that if any error be therein, it should be corrected, and that speedy justice be done to the parties in this part, do command you, that if judgment, as it is said, be rendered in the said plea, then the record and process and all things touching the same, under your seals, distinctly and openly, you have before the justices of our supreme court of Pennsylvania at a supreme court to be held at Harrisburg, in and for the middle district of said commonwealth, on the second Monday of May next, and this writ; that the record and process aforesaid being inspected, we may further cause to be done what of right and according to our laws and customs ought.

Witness the honorable Daniel Agnew, LL. D., chief justice of our supreme court at Harrisburg, the first day of February, in the year of our Lord one thousand eight hundred and seventy-five, and of the commonwealth the '99.

{ SEAL OF THE SUPREME COURT } ROBT. SNODGRASS,
{ OF THE MIDDLE DISTRICT, PA. } *Prothonotary.*

75 The record and process and all things touching the same, so full and entire as before us they remain, to the honorable the judges of the supreme court of the commonwealth of Pennsylvania, sitting in and for the middle district, we certify and send as within we are commanded.

[L. S.] M. C. HERMAN,
Pres. Judge.

[L. S.] ROBT. MONTGOMERY,
Associate Judge.

(Indorsed:) No. 151, Nov. 3, 1877. C. P. No. 72, May term, 1875. Supreme court of Pennsylvania, middle district. First Nat'l Bank, Carlisle, Penna., plaintiff in error, vs. Fannie L. Graham, defendant in error. Filed Feb. 2d, 1875. Writ of error to the court of common pleas for the county of Cumberland, returnable the second Monday of May, 1875. Rule on the defendant in error to appear and plead on the return day of the writ. Filed in supreme ct. May 10, 1875.

N. B.—20 days' notice to the parties or their counsel below is necessary to compel an appearance.

ROB'T SNODGRASS, *Proth'y.*

W. F. SADLER.

Præcipe & aff. filed Feb. 1, 1875.

ROB'T SNODGRASS, *Proth'y.*

76 7. *Errors assigned.*

The court erred:

1st. In admitting the evidence of Mrs. Trout on the offer of plaintiff, as follows:

"Plaintiff now offers to prove by witness on the stand that she had a deposit of government bonds in this same bank for safe keeping; that she drew the interest and premium on her bonds regularly until the bank closed, and that, although living just opposite the bank, she never knew or heard of the alleged disappearance. And this to rebut the presumption that there never was any robbery, and to show that bonds remained in bank till its close."

To be followed by proof of a similar character.

Objected to that the evidence must be confined to the acts of the bank in reference to the particular bonds in suit. The transactions with or knowledge of any other individual cannot be received to affect the defendant in this suit.

2d. It does not contradict Charles Hepburn, inasmuch as the fact is shown that C. H. Hepburn and Judge Hepburn personally paid the interest on the bonds lost.

Per curiam. We think the evidence is admissible for the purpose offered. If the plaintiff can show that there were no bonds taken, the defendant's liability becomes clear, and whatever supports this theory is admissible.

Evidence admitted, defendant excepts, and bill sealed.

[L. S.] B. F. JUNKIN.

Mrs. TROUT sworn:

I had bonds in this bank, and received a receipt for them, and drew interest up to July, 1873. I only heard of the loss after the suspension. Charles said I should not lose.

Amount: $250 in bonds, $100 on deposit.

2d. In their answer to plaintiff's first point:

FIRST POINT.—If the jury believes that the plaintiff deposited the bonds for the value of which this suit is brought, with the defendant for safe-keeping, and took the receipt of the cashier in evidence for the same, the defendant was bound to exercise ordinary care, skill and diligence to keep and return the same safely; such care as men of ordinary prudence exercise in the care of their own property; and if defendant did not use ordinary care to keep plaintiff's bonds safely, but kept the same negligently, then it is liable for their loss, and the plaintiff is entitled to recover their value.

ANSWER TO FIRST POINT. First point affirmed, and for the meaning of gross negligence the jury is referred to the general charge.

77 NOTE.—In affirming this point, the court hold the bank to the exercise of "ordinary care, skill and diligence." The reference to the general charge for "the meaning of gross negligence," does not properly qualify the answer; and the affirmance of this point is so inconsistent with a liability only for gross negligence, properly defined, that for this reason alone it is error.

3d. In answer to plaintiff's third point:

THIRD POINT.—If defendant was negligent, and did not exercise ordinary care, skill and caution to keep plaintiff's bonds safely, then it is liable for their value, no matter how negligent it may have been in taking care of its own property.

ANSWER TO THIRD POINT.—Affirmed. See general charge.

NOTE.—This also holds defendant to ordinary care, &c., and contradicts all authority.

4th. In affirming plaintiff's seventh point:

SEVENTH POINT.—If the jury believes that the defendant endeavored studiously to conceal the loss of plaintiff's bonds; did not inform her of their loss, although living in the same town, for some weeks afterwards, and then enjoined silence upon her by stating she should lose nothing; that it would be defendant's loss, not plaintiff's, and made no attempt to discover the alleged thief, except by procuring its attorney to write to government officers in Washington and New York, and did not telegraph or write to any bankers or brokers in Pennsylvania; this is strong evidence of negligence on the part of the bank, and proper to be taken into consideration by the jury on the question of negligence.

ANSWER TO SEVENTH POINT.—This point is affirmed. We have fully instructed you on this branch of the case in the general charge.

NOTE.—The recitals in this point are not the facts proved, and
78 even if true, are not evidence of gross negligence, nor of any negligence which "enters into the cause of the loss." The failure to give notice could not be "the cause of the bailor's loss."

This answer, with the others, shows that the learned judge below failed entirely to distinguish between want of ordinary care and gross negligence.

5th. In their qualification to their affirmance of defendant's fourth point:

FOURTH POINT.—Even if the bank could legally become a bailee, as alleged by plaintiff, the proof being clear that no compensation was paid for keeping it, and that it was taken and kept at the request of the plaintiff for her own convenience, the plaintiff cannot recover, unless she shows that the defendant was guilty of gross negligence; and the test of good faith and want of gross negligence is: "Did the bank keep the deposit with the same care and security as it did its own property?"

ANSWER TO FOURTH POINT.—Affirmed. Except that the deposit must be kept with the same care that an ordinarily prudent man would keep his own of like kind and value.

NOTE.—The definition of gross negligence in this answer contradicts every authority from that of C. J. Holt, in Coggs vs. Bernard, 2 Lord Raym., 912 and 913, to that of C. J. Agnew, in Scott vs. National Bank of Chester Valley, Legal Intelligencer, Feb. 27, 1874.

6th. In their answer to defendant's eighth point:

ANSWER TO EIGHTH POINT.—We cannot answer as requested. Her agreeing to keep silence is not concurrent negligence in the sense of that term. The effect of inducing her to keep silence cannot affect the questions on which the case turns. It is a question of gross negligence on the part of the bank, and she could do nothing by her agreement to maintain silence which could affect the question of gross negligence.

(The eighth point, and the answer of the court to it, were transposed by mistake of the printer.)

79 EIGHTH POINT.—If the plaintiff, after being informed of the loss of the bonds, acquiesced in the silence of the officers of the bank as to the loss, she is guilty of concurrent negligence, and cannot recover upon the ground that the bank did not give notice of the loss.

NOTE.—If keeping silence about the loss were negligence, and the plaintiff acquiesced in the silence and concurred in it, she concurred in the negligence. If keeping the fact of the robbery silent could not affect

the question of gross negligence, the answer to plaintiff's seventh point is error.

7th. In their definition of gross negligence, in the general charge, as follows:

Gross negligence is the omission of those precautions which persons of common care and common prudence would naturally adopt, even though they might, in reference to their own goods, omit them; so that the test of gross negligence is not simply, "Did the bailee take as much care to preserve from loss the property bailed, as he did of his own?" for he might be grossly careless of his own; "but did he take that kind of care which persons of common care (customary care) do take of their own?"

NOTE.—This is not gross negligence, but ordinary negligence.

8th. In saying in the general charge as follows:

The evidence offered to repel the alleged theft is the fact that Dinkle and Mrs. Trout, who had bonds in this bank, went there and drew their interest as before. Dinkle had $700 in bonds, and from time to time kept lifting them, by the bank paying him the cash for them, the same as if the bonds were still there; but he saw no bonds; he was paid money. The explanation offered for this apparent inconsistency is this, that after the loss was detected the Messrs. Hepburn, on consultation,
80 resolved to assume the loss, and keep it quiet lest the bank would be run upon. Now does this account for what otherwise seems unaccountable, and explain why they continued to treat the bond owners just as they had done before?

NOTE.—Miss Graham knew of the loss of her bonds, and no matter if these parties were ignorant of the theft, their ignorance and the fact that their cashier, as he said, individually paid them, could not affect the question of the liability to plaintiff, nor warrant an inference that Miss Graham's bonds were not stolen.

9th. In saying in their general charge:

Banks would be somewhat embarrassed if it were held for law that they must not open their vaults to transact their own business, for fear some bond depositor, who pays nothing for the care of his property, might lose his bond. He must incur that risk or remove his bond into his own possession, and this is altogether reasonable.

Should you find this to be the truth of the case, and that there was a larceny of the plaintiff's bonds on that 5th day of August, 1871, and that thus the bonds were lost, with no gross negligence on the part of the officers of the bank having the care of its deposits, this plaintiff should not recover; unless, however, that it is found that the plaintiff was prejudiced by the neglect of the bank to give her immediate notice of the loss, as we will hereafter explain more fully.

NOTE.—There was no evidence of gross negligence nor of any "prejudice from neglect to give immediate notice." The failure to give immediate notice could not of itself be evidence of gross negligence causing the loss.

10th. In saying to the jury in the general charge:

The bank was not bound, from the nature of the relation between it and the plaintiff, to resort to extraordinary measures to secure
81 her bonds, *but only to keep them with ordinary and customary care, as ordinarily careful persons keep the like kind of property.*

11th. In saying to the jury in the general charge:

Should no gross negligence be found by you on the part of the defendant in caring for the plaintiff's bonds, *then you must look into the effect*

of the neglect on the part of the defendant to give this lady immediate notice of the loss.

12th. In saying to the jury in their general charge:

My first impression was that it might be treated as absolute proof of negligence; but, on careful reflection, it seems to me that this would be carrying the inference too far, and that *reason requires that it should be limited to raising a presumption of negligence, which presumption may be repelled; but even when thus repelled and rebutted, it still remains a question for the jury to determine whether any injury resulted to the plaintiff from the neglect of the defendant to give her notice of the loss.* If you are satisfied that the bank, from prudential motives, either from the honest belief that publicity would only diminish the chances of the recovery of the bonds, &c., or from the fear that there might be a panic among the depositors, or from both, *and this resulted in no injury to this lady, by preventing her from adopting measures for their recovery*, then we see nothing in the want of notice which would render the bank liable. *If, however, there was a reasonable probability that her own efforts would have resulted to her own advantage in the recovery of the bonds, and thus injury resulted to her, then the bank is liable, and she should recover.* Is it probable that she, herself, could have been more successful in her efforts in this direction than the bank? This is an important inquiry, *and if it is reasonably certain to your minds that this lady would have recovered the property had the loss been immediately made known to her, the neglect of the bank to give the notice would make the defendant liable;* if, on the other hand, no such benefit would have been likely to result to her from such notice, we do not see that the failure to give it should *per se* render the bank liable.

82 NOTE.—The portions italicised are those to which we particularly except; because this is not the law applicable to depositaries without reward—mere probabilities, without any evidence on which to ground them, are submitted to the jury. Without some evidence, there could be no "reasonable certainty" that the plaintiff would have recovered the bonds by her own efforts. She made no exertions when she did discover the loss.

13th. In instructing the jury as follows:

"And, furthermore, should you find that had the bank itself taken more efficient measures to advertise the loss, employing detectives, &c., and there was a reasonable probability that the loss would have been recovered, that should make them liable."

NOTE.—This gives the jury complete control of the whole case, without regard to the principles of law which should control their verdict, and without any evidence to guide them.

14th. The charge, as a whole, tended to mislead the jury as to the law and its application to the facts in this case.

15th. Error. The court erred in their answer to defendant's second point.

SECOND POINT.—That the First National Bank of Carlisle, Pa., being a corporation, chartered under the act of Congress passed the day of , A. D. 1864, and the several supplements thereto; and the objects, powers, and duties of said corporation being thereby defined, and no power being thereby given authorizing or permitting it to become a bailee or depository of valuables in the manner alleged by plaintiff, the act of the cashier in so receiving such valuables would not make the bank liable to the plaintiff, and she cannot recover.

ANSWER TO SECOND POINT.—We have already told you that the bank is liable only where these special deposits are received from time to time

with the knowledge of its directors. If they were so received in this case, the bank is liable if gross negligence has been shown.

83 *Writ of error to the court of common pleas of Cumberland County*

In the supreme court of Pennsylvania, in and for the middle district. No. 72. May term, 1875.

FIRST NATIONAL BANK OF CARLISLE, PLAINTIFF in error, and defendant below, *vs.* FANNIE L. GRAHAM, DEFENDANT IN ERROR, & plaintiff below. } No. 151. Nov. T., 1873.

And now, to wit, Oct. 13th, 1875, judgment of the court below is reversed, and a venire facias de novo awarded.

Per curiam.

Opinion by Woodward, J.

84 MIDDLE DISTRICT OF PENNSYLVANIA, *sct.:*

The commonwealth of Pennsylvania to the justices of the court of common pleas for the county of Cumberland, greeting:

Whereas, by virtue of our writ of error from our supreme court of Pennsylvania, in and for the middle district, returnable in the said court on the 10th day of May, in the year of our Lord one thousand eight hundred and seventy-five, a record was brought into the same court of a judgment rendered against The First National Bank of Carlisle, Pennsylvania, plaintiff in error, at the suit of Fannie L. Graham, defendant in error; and it was so preceded in our supreme court, that the said judgment was reversed and a venire facias de novo awarded, and the record and proceedings thereupon and all things concerning the same were (agreeably to the directions of the act of assembly in such cases made and provided) ordered by the said supreme court to be remitted to the court of common pleas for the county of Cumberland aforesaid, as well for execution or otherwise as to justice shall appertain: Wherefore we remit you the record of the judgment aforesaid, and the proceedings thereupon, in order for execution or otherwise, as aforesaid.

Witness the Hon. Daniel Agnew, chief justice of our supreme court, at Harrisburg, the 18th day of October, in the year of our Lord one thousand eight hundred and seventy-five.

{ SEAL OF THE SUPREME COURT OF PENNSYLVANIA. } ROB'T SNODGRASS, *Prothonotary.*

(Indorsed:) No. 151, Nov. T., 1873. No. 72, May term, 1875. Supreme court of Pennsylvania. First National Bank of Carlisle, Pa., plaintiff in error, vs. Fannie L. Graham. Remittitur filed Oct. 19th, 1875.

85 Among the records of the courts of common pleas of Cumberland Co. of Nov. term, 1873, No. 151, the following proceedings appear, to wit:

Appearance docket entry.

Continuation of record.

Graham Hays.

FANNIE L. GRAHAM
vs.
FIRST NAT'L BANK OF CARLISLE, PENNA.

Hepburn Sadler.

Oct. 19, 1875, per remittitur filed. Judgment and a venire facias de novo awarded.

And now, 25th Feb., 1876, jury of the county being called, came, to wit: B. Heusley, J. Cornman, H. Lieb, J. P. Wilber, Jas. McCormick, G. H. Meddecoff, Jno. Stine, Theo. Grissinger, Jno. Fagan, Jno. Deihl, Geo. Neninger, & Abraham Simmons, who were severely ballotted for, elected, empannelled, sworn or affirmed, 25th Feb., 1877. Pending the trial a juror was withdrawn, and the case continued by the court.

Now, to wit, 12th March, 1877, a jury of the county being called, came, to wit: John Ashburn, J. Dunlap, D. Rupp, Jno. Killian, H. Baker, Geo. W. Stevick, H. H. Ziegler, R. Wilson, A. B. Shullenberger, T. R. Berger, W. Clark, & L. Heogy, who, being severally ballotted for, elected, empannelled, sworn or affirmed, respectively, do say they find for the plaintiff, $5,427.95.

Verdict rendered 15th March, 1877.
17th March, 1877. Court's notes of trial &c., filed.
March 21, 1877. Judgment.
Judgment docket, vol. 1, No. 1, p. 42.
April 18, 1877. Writ of error filed.

CUMBERLAND COUNTY, *ss:*

I do certify that the foregoing is a true copy taken from the records of the common pleas of said county. Witness my hand and seal of the said court, April 24th, 1877.

[SEAL C. P. CUMB. CO.] J. R. IRVINE,
Dep'ty Proth'y.

86 SECOND TRIAL.

In the court of common pleas of Cumberland County.

FANNY L. GRAHAM
vs.
FIRST NATIONAL BANK OF CARLISLE. } No. 151, November term, 1873.

Trespass on the case.

March 12, 1877, jury called.

Evidence for plaintiff.

Plaintiff offers as per paper marked M. C. H. No. 1.
Objected to as per same paper.
Admitted. Defendants except and bill sealed.

[L. S.] M. C. HERMAN.

Receipt of Charles H. Hepburn, cashier, dated 22d Oct., 1868, for $4,000 U. S. 5-20 bonds (1867s), (4 bonds of $1,000 each.) To be returned on return of receipt.

It is admitted that the market value of the bonds at the time suit was brought was $111, and that the coupons were paid up to 1st July, 1873; that the coupons up to 1st January, 1877, unpaid, amount to $720 in gold (premium in gold to be added;) that suit being brought October 13, 1873, the price of the bonds at $111 included the interest falling due 1st January, 1877.

These admissions are made in behalf of the defendant, subject to the exception taken to the admission of offer No. 1.

Plaintiffs offer to prove the price of gold at the time the different coupons fall due, commencing with the coupons falling due 1 Jany., 1874.

Objected to, that the ranging price of gold is immaterial.

Admitted. Defendants except and bill sealed.

[L. S.] M. C. HERMAN.

1 January, 1874,	price	gold	.....	$111
1 July, 1874,	"	"	.....	110
1 Jan'y, 1875,	"	"	.....	112
1 July, "	"	"	.....	117
1 Jan'y, 1876,	"	"	.....	112¼
1 July, "	"	"	.....	112⅜
1 Jan'y, 1877,	"	"	.....	106⅞

87 Price bonds (1867s), 10th March, 1877, $112¼.
Price gold, 10th March, 1877, 104¾.

FANNIE L. GRAHAM sworn:

About 3 weeks after the bonds are said to have been taken I went first to the bank to inquire about some Monmouth bonds. I heard through my brother that the Monmouth bonds had been taken, and that I went to inquire about it and met Charles Hepburn, who told me the Monmouth bonds had been recovered, and then I asked about the government bonds. He told me they had been taken too; that I should come into the back room. He assured me I should lose nothing, and that I should keep quiet about it and say nothing at all; that it was their loss and not mine; that I should come on and draw my interest as I always had done. I just drew my interest after that as before.

Bank book shown witness, which she says is hers.

Plaintiffs offer the bank books of the defendants' bank, showing that the coupons on these bonds were regularly credited to the plaintiff, with the premium added, up to and including July 1, 1873. This for the purpose of showing that as the cashier had stated to her that it was their loss and not hers, and that she should come on and get her interest as before. She did go on and get her interest as it fell due, and for the purpose of corroborating her statement.

Objected to:

1. That the witness having stated that she had been informed that the bonds had been taken or stolen, the mere fact that the interest was paid to her is immaterial.

2. It is not offered to show that the interest was paid on these bonds.

3. The bonds do not show the payment of coupons on these bonds.

Per Curiam: The books submitted to us shows credits to her of coupons and interest. The evidence is admitted. Defendants except and bill sealed.

[L. S.] M. C. HERMAN.

Credits.

Jan'y 8, 1872.	"Coupons and premium"		$129 60
July 6, "	Interest and premium		135 00
" 12, 1873.	Coupons	120 00	
	Premium	16 80	
			136 80

These credits are from the deposit book.

From the ledger appear the following, in plaintiff's individual account:

Credits.

Jan'y 8, 1872,	Coupons and premiums		$129 60
July 6, "	Int. and prem. bonds		135 00
" 12, 1873.	Int. on bonds	120 00	
	Prem	16 80	
			136 80

WITNESS. I never got these bonds from the bank. At one time
88 I got the money for the interest. I think, January, 1873. Got no money at any other time.

Cross-examined:

I live in Carlisle. I had bonds in the bank before 1868. In 1868 they were called in and changed, and they were left there for safe keeping. I suppose they charged me nothing for keeping. It was about the last of August, 1871, that I first heard the Monmouth bonds were taken. I heard from my brother that they had been lost or stolen. I told Charles Hepburn this and he told me they were recovered, and then I asked about the government bonds, and he said they were missing from the bank—he said they were gone too. Think he said he didn't know how. Judge Hepburn told me they were stolen, and that if it were made public it might injure the bank. He said they had some idea who took them or where they were gone to, and they might recover them, and to say nothing about it. The second or third time I saw the judge he said he was not legally responsible for them, but that I should lose nothing. The last interview I had with him he said he was morally but not legally responsible.

Charles said, "Come on and draw your interest as you always have done." The first few times after leaving the bonds there I saw Charles cut the coupons off and then didn't see him cut them off any more. He collected the coupons. He paid me last in July, 1873. I kept quiet in a measure. I told a few persons about it, but didn't tell them to say nothing.

In chief:

Charles first told me to come and draw my interest as before, and Judge Hepburn next told me the same thing. Charles was cashier and Judge Hepburn was president. I had called on Judge Hepburn a number of times. The first time he told me I should not lose anything, that they could afford to lose it better than I could. I had no other government bonds except these $4,000. I had 8 Monmouth bonds $100 each; had no other bonds.

Plaintiff offers as per paper marked M. C. H., No. 2.

Objected to as per same paper.

Admitted. Defendants except and bill sealed.

[L. S.] M. C. HERMAN.

Book in evidence, and shows in the rear end of the book a registry of bonds and valuables left for safe-keeping—amongst them 4 bonds U. S. 5-20, Nos. , of $1,000 each.

Mrs. FANNIE HARTZLER sworn:

Plaintiffs offer to prove by the witness on stand that she had deposited bonds with the First National Bank of Carlisle for safe-keeping, for the purpose of showing the custom of the bank of receiving deposits of that kind.

(Objected to as being irrelevant to the issue trying, and also as per same objections as that to first offer.)

Admitted. Defendants except and bill sealed.

[L. S.] M. C. HERMAN.

WITNESS. I had a $500 government bond with the bank, and
89 got a receipt for it, dated 20th March, 1869. My father had the bonds there and he transferred them to me. I got this receipt (marked A, M. C. H.) when I drew my last interest.

Receipt marked A, M. C. H., in evidence under last exception.

This receipt signed by Jno. G. Orr.

HENRY STRICKLER affirmed:

I deposited 30th June, 1869, $600 U. S. 5-20 bonds of 1867, and got receipt for same, signed by Charles H. Hepburn, cashier.

This receipt, marked B, M. C. H., in evidence.

This admitted under objections to last offer.

Mr. HOFFER sworn:

I was cashier until about 1st January, 1868, of this bank; can't tell how long before—a couple of years. I was teller before I was cashier. We were in the habit, whilst I was there, of receiving U. S. bonds and other valuables for safe-keeping.

I don't recognize the writing on first page of the registry of bonds, &c., in the bank-book in evidence. The last four entries on second page are in handwriting of Charles H. Hepburn. On the third page the first, third, and fourth are John G. Orr's; the others on third page are Charles H. Hepburn's. The receipts pasted in the book signed "J. C. Hoffer, cashier, per Orr," is the kind of receipt we were in the habit of giving. (This receipt marked C, M. C. H.)

Cross-examined:

The entries in this book were after I left. When I was there we kept a regular memorandum in the back part of one of the books. I don't think there was ever a report of these kind of deposits made to the directors. They were not connected in any way with the working of the bank, but were received for the sole benefit of the depositors. The bank received nothing.

In chief:

These deposits were put into the vault. The directors never went into the vault except when there was an examination, and then we would show them all the assets we had in the vault; don't know how often these examinations were made.

Mr. Hepburn and Mr. Mullin were presidents while I was there. The president, Mr. Hepburn, had a package there. I think he was a director when Mullin was president; think he kept his package there when Mullin was president.

Cross-examined:

These special deposits had nothing to do with the working of the bank, and we never showed them to the directors.

In chief:

The receipt of the bonds and valuables on deposit was not a matter of concealment, and I think the board of directors were aware of it. Several of the board of directors had packages there themselves. Judge Hepburn was in the habit of going into the vault for the purpose of getting his large pocket-book, which was kept where the other valuable packages were kept in the vault. The packages were usually put up in envelopes and endorsed.

When I was there Wm. Kerr, Jno. S. Sterrett, Wm. B. Mullin, Richard Woods (all these dead), Isaac Brenneman, Judge Hepburn were directors. I think Mr. Sadler was one. There were some little changes.

90 The defendant objects to the witness stating who of the directors had packages on deposit in the bank.

Objection overruled. Defendants except and bill sealed.

[L. S.] M. C. HERMAN.

WITNESS: I think Sterrett and Kerr had packages there, but can't say positively. It is an impression on my mind that they had.

Cross-examined:

The receipt of packages of this sort was a custom we got into for the accommodation of customers. I suppose the directors knew of it, because some of them deposited similar packages th're in the same way. There was nothing said about it. I don't know of any of the directors looking particularly at these packages. It was not the custom of the directors to go into the vault. I never brought out any packages of individuals to show them to the directors; couldn't recall any instance in which I told the directors.

F. S. DINKLE sworn:

I had a bond—$600 government bond—in this bank. The last amount I had there was $100. I took out occasionally as occasion required and got new receipts; I got the last receipt about a year before the bank failed.

Plaintiffs propose to prove who were the directors of the bank from January, 1868, down to the failure of the bank, for the purpose of showing who were the directors of the bank to whom knowledge of the practice of making these special deposits is to be brought home.

Admitted without objection.

14 January, 1868.—Election for directors. William Kerr, Isaac Brenneman, A. K. Rheem, Jonathan Snyder, Samuel Hepburn, Jesse Hetrick were elected. Sworn in 21 January, 1868.

12 January, 1869.—Samuel Hepburn, W. F. Sadler, Isaac Brenneman, A. K. Rheem, Jonathan Snyder, Henry Snyder, Charles H. Hepburn elected directors.

11 January, 1870.—Samuel Hepburn, Charles H. Hepburn, John G. Orr, Samuel Hepburn, jr., Hopewell Hepburn elected directors.

January, 1871.—Directors elected. Same as in 1870.

January, 1872. Samuel Hepburn, Charles H. Hepburn, John G. Orr, Hopewell Hepburn, Henry M. Hepburn elected directors.

January, 1873.—Directors elected. Same as in 1872.

ISAAC BRENNEMAN sworn:

I was a director, the minutes show, in 1868 and 1869; I began a director in the time of Kerr, Dunlap & Co., and continued until I went out in 1869.

I think there were some deposits of bonds made in my time. The only knowledge I have is that it was talked over in the board that there were bonds there; that there were deposits of bonds and such depositors made them. I never saw them. The National Bank succeeded Kerr, Dunlap & Co.

Cross-examined:

I heard the directors talk about these deposits when the board met still; but can't give any dates. No special deposits, such as
91 bonds, &c., for safe-keeping, were ever reported to the board. The way the board come to talk about them was that it was a question whether we were responsible for them—we receiving no pay for their keeping. I can't tell whether this talk was in time of Kerr, Dunlap & Co., or not. It was frequently talked about.

In chief:

Judge Hepburn was a director in time of Kerr, Dunlap & Co.

I think both Judge Hepburn and Mullin were presidents while I was director in '68 and '69.

Dr. NEIDICH sworn:

I had government bonds deposited with this bank at various times from the time of Kerr, Dunlap & Co., on down through time of First National Bank. Can't tell the years; it was on along during time the war was going on. In 1865 and from that along to in 1868 and 1869. I made nine or ten different deposits from 1865 up to Oct., 1869, of different kinds of bonds—U. S. bonds and U. Pacific bonds.

I cut the coupons off sometimes, and they did sometimes and were credited to my account.

Mrs. TROUT sworn:

I had U. S. bonds deposited for safe keeping in the bank—$250 in bonds. I made the deposit first soon after the new bank opened. Judge Hepburn was president.

Cross-examined:

I paid nothing for keeping of the bonds.

Plaintiffs offer as per paper marked M. C. H., No. 3.

Objected to as per same paper.

Contra.—Fowler vs. Scully, 225, 461; 3 C. 339.

Offer admitted. Defendant excepts and bill sealed.

[L. S.] M. C. HERMAN.

Stockholders.

Samuel Hepburn	460 shares.
Charles H. Hepburn	10 "
John G. Orr	10 "
Hopewell Hepburn	10 "
Henry M. Hepburn	10 "

The stock was so held from 9th November, 1869, except Henry M. Hepburn, who came in in October, 1871.

The minutes show no regular meeting of the board from November

23d, 1869, until 1st October, 1873, when the bank suspended, excepting for the election of new boards and organization, and four meetings on 25th January, 1870, 1st, 8th, and 15th February, 1870.

The capital stock was $50,000, in 500 shares.

CHARLES HEPBURN sworn:

I was cashier from January, 1868, to October, 1873. There were no other regular meetings of the board except those shown by the minutes. We considered it a meeting of the board when it was a regularly organized meeting. Judge Hepburn, Mr. Orr, and I, when we were there, discounted paper, but we didn't consider it a regular meeting of the board.

When we three were in the bank the paper was discounted the same as if we had a formal meeting of the board; we considered it sufficient to see the paper and discount it; we didn't consider it necessary to have a formal meeting to discount paper. I don't recollect whether we three or all met to elect directors. It wasn't necessary that all should meet, because father's vote was sufficient to decide the matter. I have no recollection of saying that there was no formal meeting nor formal voting. If it is taken down on former trial I must have said so. I would more likely recollect better then than now. I say now that father's vote would determine the matter. I did not say before that when Orr and myself were in the bank together we considered this a formal meeting. It is so printed, but I did not say it. I said we discounted paper the same as a formal meeting. I know of no other ordinary business to be done at formal meetings. Even when we had formal meetings the paper had nearly all been already discounted and was merely laid before the board.

92

I don't recollect of Hope or Harry attending any formal meetings.

Harry lived with my father; Hope did too; I lived with him too.

I think Harry was 21 in 1872; don't *rd*collect the year he was born in.

Plaintiffs offer as per paper marked M. C. H, No. 4.

Objected to as per same paper.

Pro.—Sec. 186, 1 Greenleaf; Overholtzer vs. McMichael, 10 Barr, 139; McNair vs. McClellan, 12 H., 384.

Contra.—7 C. & P., 6.

Pro.—B. & A.; 5 C. & P., 385; 24 Eng. Com. Law.

Per Curiam.—Granted that the admissions on the former trial would be evidence on this trial. The method of proof is objectionable. The plaintiffs propose to prove these admissions by first proving the handwriting of Judge Junkin, who presided and kept the notes of the court on the former trial, and then read from his notes of that trial the alleged admissions. This cannot be done. To prove the matter contained on his notes, although being the record of the former trial, which was taken up to the supreme court, he should be called to testify as to the admissions entered thereon by himself. The defendants are entitled to the privilege of a cross-examination. If the plaintiff can make legitimate proof of the alleged admissions made on the former trial, such admissions will be admitted, but they cannot be admitted through or by means of the method of proof proposed. The offer is therefore rejected. Plaintiff excepts and bill sealed.

[L. S.] M. C. HERMAN.

FANNIE L. GRAHAM recalled:

Judge Hepburn certainly knew before the failure that I had bonds in

the bank; but I do not recollect any conversations. The same day or the day after the bank closed, Judge Hepburn said the bank was in as good condition, if not better than ever it was, and that in a few days it would be open again. Charles Hepburn told me in the bank that
93 the bank would pay more than its liabilities; the bank was closed at the time. The judge had sent me there to get some money from Charles.

Plaintiff closes.

The plaintiff having closed her case, the defendants move the court for a compulsory nonsuit, on the ground that the plaintiff has given no evidence to sustain her action.

Mr. Hepburn cites Smith vs. Bank (99 Mass. 60); Bank vs. Graham (29 Smith, 106); Scott vs. Bank (22 Smith, 471; 12 Smith).

Per curiam: We think the evidence on part of the plaintiff now before us raises a question of negligence which must be submitted to the jury. The motion for a compulsory nonsuit overruled.

M. C. HERMAN,
Pres't Judge.

Evidence for defendant.

SADLER opens.

CHARLES H. HEPBURN recalled: Miss Graham had $4,000 U. S. Government bonds of 1867 in the bank for safe-keeping. They had originally been there as 7.30s. I converted them into 5-20s for her. She had them there a while and took them out, and a short time after brought them back, and it was then that I gave this receipt. We charged nothing and received nothing for them. They were in the original express envelope as they came from Washington, and were tied up with some other packages of bonds belonging to other parties and other miscellaneous papers and placed within the safe in a small apartment just above where the money and other valuables of the bank were kept. The safe was inside the fire-proof vault. These bonds never went into its working of the bank nor had anything to do with the workings, and was never stated with the assets and were never in fact used by the bank.

I first noticed their disappearance about 5 o'clock in the evening of 5th August, 1871. After our banking hours were over I was returning the money and property of the bank, that we had out for the working of the bank during the day, into the safe. When I placed it in I noticed that a package of money was missing from the safe, and not knowing what had become of it I sent for Mr. Orr, who had gone down street, to inquire what had become of it. He then came, and I asked him if he had made any use of that money, or knew what had become of it, and he replied that he did not know what had become of it. He was the teller. He then looked around through the safe and discovered that the bonds of Miss Graham and also a large pocket-book containing title papers and other papers had also disappeared. That was the first I knew of these bonds being taken. About $3,500 of the bank were taken. The pocket-book contained the title papers of the bank and our receipts for our bonds at Washington and policy of insur-
94 ance. The whole package in which the bonds of Miss Graham's were was taken. There was a S. M. R. R. bond belonging to Judge Hepburn also in the package.

We never recovered any of these things except the papers that were of no value to any one but the bank, and the Monmouth bonds of Miss

Graham. I never heard of any other of the bonds except some two or three government bonds which the Secretary of the Treasury, at Washington, informed us had gone in there for redemption from different parts of the country.

I do not know who got them. They never went into the work of the bank in any shape or form.

Cross-examined: We generally counted our money about once a week—all of it. Made a daily settlement, and if we didn't settle right counted the money—if it came out right we didn't count it until the end of the week. The daily settlement showed the amount of money on hand.

The daily settlement book was a small one I kept in my desk in pencil. I suppose all the books went into Mr. Sadler's hands. I didn't see it after the bank was closed.

The door of the vault opened into the bank behind the counter. There was a passage-way about three feet wide from the end of the counter to the vault from the back room; directors' room.

Plaintiff offers as per paper marked M. C. H. No. 5.

Objected to as per same paper.

Offer admitted. Defendants except and bill sealed.

[L. S.] M. C. HERMAN.

WITNESS: (on cross-examination): There was no door from cashier's apartment to the vault—there was, a doorway, but no door. There was a door from the outside room to the directors' room. I could see my (cashier's) desk into the vault. The partition was about three feet from the vault. There was a door leading from the vault into the directors' room. There was a window in the directors' room leading into the back yard and an alley common to the two houses leading back to the rear and a gate going into the yard. The shutters were open during banking hours. I generally pulled the sash down from the top in warm weather. There were two heavy wooden doors beneath the window, bolted at side and bottom. No wire screen on the window. The door from front room into directors' room was generally unlocked. From the vault into directors' room it was often closed and often opened; it was not bolted. There were heavy wooden shutters on the window. I saw the package last before 5th August, a couple days before; a day or two before, I think.

Plaintiff offers as per paper marked M. C. H. No. 6.

Objected to as per same paper.

Offer admitted.

WITNESS. I don't recollect of Cheno with asking me if I knew how the package got away. I don't recollect what I said to him. I always said I didn't know how it got away. If the conversation was two or three days after, or a week after the 5th August, then I say that I did
95 not say we had missed them two or three weeks before, because the first I knew of its disappearance was on 5th August.

In chief:

From my seat I could see into the vault and safe. The upper part of the interior of the safe where the bonds were kept was closed by two doors and locked with a common lock, and the outside were very heavy folding iron doors with combination locks. It was a Lilly burglar proof safe.

There were two doors to the vault, one outer and inner. The inner door was thin iron ¼ to ½ inch thick with combination lock, and the outer was a very heavy iron door with combination lock also. When shut

and locked the doors were hard and troublesome to open. We had to leave them open during banking hours for convenience' sake; it would have taken up too much time to lock and unlock them every time we had occasion to go to the safe in banking hours. It is the practice in banks to leave the doors open during banking hours.

I saw the package of money that was taken about 9 o'clock that morning of 5th August. I didn't look for the bonds that morning; they were in an apartment above the money, in the safest and most secure part of the safe. I saw the bonds the day before. The 5th August was on Saturday, and on Monday following I wrote to the cashier of a bank in Monmouth to see the officers of the corporation that issued the Monmouth bonds and stop their payment. Miss Graham came to the bank about eight or ten days afterwards to inquire about her Monmouth bonds. I told her the Monmouth bonds had been returned, and that the government bonds were gone too, but that they were not returned; that they had been lost or stolen, I didn't know how. I also told her that the president of the bank and I had talked it over and that she should not lose anything, that we had determined to make an individual matter of it and pay her and that she should just come on as she had done before and get her interest. I paid her the interest up to July, 1873. I told her not to say anything about it, that we wanted the matter kept quiet, because if it got out it might be injurious to the bank. She made no objection. She acquiesced in that. I had letters written to the Secretary of the Treasury, to the assistant treasurer at New York, and some parties in Philadelphia, about the loss, and to try to stop the payment of the bonds. I supposed at the time they could be caveated; but learned afterward that could not be done.

We put the bonds in what we supposed was the safest part of the safe and took all possible care of them we could; we left nothing open that could be kept closed without the greatest inconvenience to business.

We consulted together, that is, the president, Mr. Orr, and myself, and concluded it was best for the interest of the bank to keep the matter quiet and make what effort we could to recover the bonds.

Defendants offer as per paper marked M. C. H. No. 7.

(Objected to as per same paper.)

96 Per curiam: The offer as made is rejected, but the defendants may ask the witness whether he acted honestly in his efforts to recover the lost bonds.

Plaintiffs except and bill sealed.

[L. S.] M. C. HERMAN.

WITNESS. We acted honestly in our efforts to secure the recov' of the lost bonds.

Defendants propose to ask witness whether or not he made the same efforts to recover the lost bonds that he made to recover the lost property belonging to the bank.

Objected to that they can prove what efforts they did make, and it will be for the jury to say whether he made the same efforts to recover the lost bonds that he did to recover the property of the bank.

2. He may have made no effort to recover the property of the bank.

Per curiam: The witness must state what effort he did make to recover the lost property, and it will be for the jury to say whether he made the same effort to recover both.

The offer is rejected.

WITNESS. In all the efforts I made to recover the lost property, I

made no efforts to recover the property of the bank which I did not make to recover the lost bonds. We wrote until we got tired. Letters were written to the Treasury at Washington, assistant treasurer at New York, and, I think, to other parties in New York and also in Philadelphia.

Cross-examined:

We opened the safe about nine in the morning and closed a little after three, and sometimes later in the day.

The package of bonds in the safe was about 16 inches long and about 2½ or 3 inches thick. The pocket-book about 8 to 10 inches long and 3 or 4 inches thick—this is a mere estimate.

I am certain I last saw the package within a day or two before 5th August: have no recollection when I saw the bonds last.

I meant that my father and myself had made an individual matter of it when I told Miss Graham to come on and get her interest.

Plaintiff offers as per paper marked M. C. H. No. 8.

Objected to as per same paper.

Admitted without objection.

WITNESS. We had to the credit of profit and loss several thousand dollars, from which we could have declared a dividend and passed the amount to our own credit, but instead of that we concluded to let that fund remain there to meet these things and charge these things against it as they came in. I didn't charge any salary up until the bank closed, and then I charged up all my salary. I must have said as printed in third section on page 14 of paper book. When the bank closed I charged up all my salary.

Plaintiff offers as per paper marked M. C. H. No. 8.

Objected to as per same paper.

Offer rejected. Plaintiff excepts and bill sealed.

[L. S.] M. C. HERMAN.

97 WITNESS. The interest paid plaintiff was charged off to profit and loss account. Father and I talked it over about making no dividend and paying it off as the simplest way of doing. We did in bank pretty much what he and I agreed upon. The surplus fund was $25,000. Think we declared no dividends after this.

JOHN G. ORR, sworn.

I was teller prior to and on and after 5th August, 1871. I knew Miss Graham had bonds at the bank for safe-keeping. They were kept in one of the upper apartments of the safe; don't know when I saw them last. They were there in July previous when the coupons were taken off; don't remember positively of seeing them after that; but they couldn't have been missing a month without my knowledge of it. On the afternoon of 5th August, 1871, I was absent from the bank, having come down to the court-house a few minutes before the bank closed. I was sent for to come to the bank about 3½ o'clock, and I went up to the bank. When I got there the cashier asked me if I knew anything about some money that was missing. I told him I did not, and I went into the safe and found the cash was nearly all gone. All but two or three hundred dollars of small bills and the money that was out in the room that day. After being there awhile I asked him if he had looked for the bonds and he said not. I went into the safe and found that a package containing bonds and a number of other papers was missing, and also a large pocket-book containing papers of different kinds. Miss Graham's bonds

were amongst those in the package that was missing. I never saw the bonds after that. We never recovered the bonds. These bonds were never carried into the workings of the bank or used by it in any way. I do not know who took them. They were kept as all the other papers and valuables of the bank were kept, and as best we knew how to take care of them.

Cross-examined:

I was director of the bank. All the bonds that were there for safe-keeping were taken; don't remember whether I saw the package of money that day or not. I saw it the day before. There was no evidence that I know of of any breaking in about the bank. Don't remember of having the bonds on the counter at any time. There was a table there that we took them to still when we took the coupons off. Didn't keep the large pocket-book on the desk or counter at any time. John McCartney was the watchman. No wire screen up at counter at that time.

The packages of notes taken were notes in 5s, 10s, and 20s; don't know if any of larger denomination. They were put up in $250 and $500 packages. There may have been one package of $1,000.

I may have had a conversation with McCartney—suppose I had; don't remember whether McCartney asked me what had been lost and how it happened. Don't remember of telling him about this time that the large pocket-book had been taken a couple of weeks previous. He may have asked me how the loss occurred; didn't tell him that time (within a couple weeks after 5th August, or at any other) that we kept pocket-
98 book on the counter and they had reached over the glass frame and taken the pocket-book. Have no recollection of telling him it was taken when we had our backs turned; don't remember of him telling me that would be a pretty good reach to get it. I didn't tell McCartney at any time that the iron screen had been put up along the counter after this occurred to prevent a recurrence of anything similar.

Package of bonds about 2½ inches thick; don't remember exact size of it.

Judge HEPBURN, sworn.

I was president of the bank in 1871. I don't know what day in August it was. It was early in August. My son Andrew was here on a visit. We were at home when I heard of the stealing of these bonds. Andrew and I walked up to the bank together, and then for the first time did I learn that Miss Fannie Graham had bonds in the bank. I never heard of it before and knew nothing about them being there, and most certainly I never touched those bonds or had anything to do with them or knew anything about them from that day to this.

The same efforts were made to recover these bonds that were made to recover all the other lost property. We most certainly acted in good faith and honestly to recover the lost bonds.

The plaintiff objects to the witness stating that he acted in good faith and honestly in their efforts to recover the lost bonds.

Admitted. Plaintiffs except and bill sealed.

[L. S.] M. C. HERMAN.

WITNESS. I went to Harrisburg and consulted with Mr. Weir, who was and had been cashier of the Harrisburg Bank for many years, and is yet; told him of the loss. All we did in the matter was in accordance with his suggestions and our own best judgment.

JOHN G. ORR, recalled.

I never saw these bonds after 5th August; never appropriated them to my own use, nor were they appropriated to the use of the bank in any way that I know of.

Judge HEPBURN, recalled.

Says the same as just stated by Mr. Orr, and that they were never appropriated to the use of the bank.

Articles of association of the bank and dated 26th May, 1863, and organized under act of 25th July, 1863.

CHARLES H. HEPBURN, recalled.

I never appropriated these bonds to my own use, nor were they appropriated in any way to the use of the bank.

Cross-examined:

I think all the bonds were taken. A box of David Kerr was there; it was not taken; don't know what was in it.

The officers of the bank wanted the matter kept quiet. I mean the president, cashier and teller. It was talked over and it was agreed to be the best that could be done. These then were a majority of the board of directors and of the stockholders.

Defendants close.

99 *Plaintiff rebuts.*

Plaintiff offers a draft of the banking room of defendant for the purpose of showing the jury the arrangement of the room as described by the witness Hepburn.

Objected to—that the description of the room and building was brought out by the plaintiff on cross-examination; it is not rebutting to anything offered by defendants; it is irrelevant and immaterial.

Per curiam: The correctness of the draft is admitted to be correct. The offer is admitted for the purpose offered.

Defendants except and bill sealed.

[L. S.] M. C. HERMAN.

Draft in evidence.

WILLIAM CHENOWITH, sworn.

I had a conversation with Charles H. Hepburn on 12th August, 1871. I asked him if he had lost anything out of the bank, and he said he had missed it about three weeks before that day. I had notified him that day that a package supposed to belong to the bank was found.

Cross-examined:

I am positive that he said "about three weeks ago." I may have said in former trial, "Since two or three weeks ago." My impression now is that he told me "About three weeks ago." I am pretty confident that he said "About three weeks ago."

JOHN MCCARTNEY, sworn.

I was watchman at the bank some five or six years; was there in August, 1871.

From eight to ten days to two weeks after this thing should have occurred—this robbery that should have happened, I had a conversation with Mr. Orr in the bank. I asked him how it was that this thing

happened; asked him what was taken. He stated that a large pocket-book that was sometimes on the large table was taken; that it had the bonds and things in it. Sometimes it was kept on the large table behind the clerk's desk, next the hall of the house. I asked how they got that off the table, and he said it wasn't taken from the table; that they had taken it over to the desk where they kept the change, in the centre of the counter, and while they had their backs turned some person reached over and took it from the place where the change is kept. There was a frame with frosted glass around this place on the counter. After he said this I said I didn't see how they could have reached over the frame and get it—that it would take a tall man to do that, and then he said he had often reached over there and got things out.

Then I had another conversation with him and he told a different way it should have been taken, and I said I thought the wire screen was put on the counter to prevent things being taken.

100 FANNIE L. GRAHAM, recalled.

Charles Hepburn said nothing about individual liability until after the bank failed.

Plaintiff closes.

Defendant's rebut.

JOHN G. ORR, recalled.

Don't remember telling McCartney that I could reach over the frame on the counter and had often done it to get things, nor of his trying to do it. A tall man could have reached over. I might have had such a conversation with him. It is a good while ago.

Evidence closes.

101 *Charge of the court.*

GENTLEMEN OF THE JURY: On the 22d October, 1868, Fannie L. Graham, the plaintiff, left with the cashier of the First National Bank of Carlisle, the defendant, at the banking-house, four U. S. Government bonds, amounting to $4,000, for safe-keeping, to be returned on the return of the receipt given by the cashier. These bonds never having been returned to her, this suit is brought to recover their value. No compensation was to be received by the bank for the care of this deposit. It was simply a naked bailment—a deposit without compensation. No undertaking was expressed except that the bonds should be returned on return of the cashier's receipt. For such a bailment the bailee is answerable only for gross negligence, which means that, in the care of the deposit the depositary is bound for slight diligence only; and the measure of slight diligence is that degree of diligence which persons of less than common prudence or, indeed, of any prudence at all, take of their own concerns.

When a bailment is for the sole benefit of the bailor, the law requires only slight diligence on the part of the bailee, and of course makes him answerable only for gross neglect. When the bailment is for the sole benefit of the bailee, the law requires great diligence on the part of the bailee, and makes him responsible for slight ne .

When the bailment is reciprocally beneficial to both parties the law requires ordinary diligence on the part of the bailee, and makes him responsible for ordinary neglect. Now in this case no compensation

was to be received by the bank for the care of the plaintiff's bonds. The deposit was simply a naked bailment, for the sole benefit of the plaintiff. For such a bailment, as we have seen, the law requires only slight diligence on the part of the bailee, and makes him answerable only for gross negligence. Gross negligence is the want or omission of slight diligence; and the measure of slight diligence is that degree of diligence which persons of less than common prudence or, indeed, of any prudence at all, take of their own concerns.

To justify a recovery against the defendants in this case the jury must be satisfied from the evidence that the plaintiff's bonds were received by the cashier for safe-keeping with the knowledge and acquiescence of the officers and directors of the bank, and that the bonds were lost by the gross negligence of the bank or its officers.

If the cashier of the bank was in the habit of receiving such deposits for safe-keeping, and this habit was known and acquiesced in by the officers and directors, then their knowledge of the receipt of the deposit of the plaintiff's bonds into the bank for safe-keeping and their acquiescence in the reception thereof would be presumed.

Plaintiff's and defendant's points answered.—See answers attached to points.

Plaintiff and defendant except to the charge of the court and bill sealed.

[L. S.] M. C. HERMAN.

102 *Plaintiff's points & answers.*

On part of the plaintiff the court is respectfully requested to charge the jury on the following points, and file their answers with their charge in writing, of record in the cause.

FIRST POINT.—If the jury believe that the plaintiff deposited the bonds, for the value of which this suit is brought, with the defendant for safe-keeping, and took the receipt of the cashier in evidence for the same, and that the cashier of the bank was in the habit of receiving bonds and other valuables for safe keeping in the bank, and this habit was known to the directors and acquiesced in by them, and that the bonds of the plaintiff were lost by the gross negligence of the defendant's officers, then the verdict of the jury should be for the plaintiff.

ANSWER.—This point is answered in the affirmative, and we so instruct you.

SECOND POINT.—Gross negligence is a fact from all the circumstances of the case exclusively for the jury, and is the want of such care in keeping the bonds as bankers or holders of such securities, as a class, use in keeping such property, and if the jury believe that the defendant was grossly negligent in the care of the plaintiff's bonds, and they were lost in consequence of such negligence, then their verdict should be for the plaintiff.

ANSWER.—This point is answered in the affirmative. We have explained to you the meaning of gross negligence, which is the want or omission of slight diligence, and the measure of slight diligence is that degree of diligence which persons of less than common prudence, or, indeed, of any prudence at all, take of their own concerns.

THIRD POINT.—If the defendant took the same care of plaintiff's property that it did of its own, but was grossly negligent of both, this will not excuse the defendant from liability to the plaintiff for the loss sustained by such gross negligence.

ANSWER.—This point is answered in the affirmative, provided you

find that the act of the cashier in receiving the deposit of the plaintiff's bonds was known and acquiesced in by the officers and directors of the bank.

FOURTH POINT.—The fact that no announcement was made to plaintiff of the loss of her bonds for two or three weeks after the al-
103 leged loss occurred, and then only upon making inquiry of cashier for her bonds, is fairly a subject for the consideration of the jury in determining the question of gross negligence, and it is for them to weigh it in connection with the other evidence in deciding the question of gross negligence on the part of the defendant.

ANSWER.—This point is answered in the affirmative. You will, however, remember the testimony of the witnesses as to the length of time that intervened between the time of the alleged robbery and the notice to Miss Graham of the loss. Charles H. Hepburn says it was about eight or ten days. Miss Graham says she received notice of the loss the last of August. It is alleged that the loss occurred on the 5th August.

The fact that no announcement was made to the plaintiff in the interval of time between the time of the alleged loss and the time she actually did receive notice of the loss, and that the loss was only then announced to her upon her inquiring of the cashier for her bonds, is fairly a subject for the consideration of the jury in determining the question of gross negligence, and it is for the jury to weigh it in connection with the other evidence in deciding the question of gross negligence on the part of the defendant.

FIFTH POINT.—That in determining the question of gross negligence by a bailee the jury may take into consideration the value of the deposit, and that care which would not amount to gross negligence in keeping a deposit of trifling value might amount to gross negligence in taking care of a deposit of the value of thousands of dollars and the loss of which would be irreparable.

ANSWER.—This point is answered in the affirmative, and we so instruct you.

The value of the deposit is an important ingredient to be taken into consideration upon every question of negligence; for that may be gross negligence in the case of a parcel of extraordinary value which in the case of a common parcel would not be so.

SIXTH POINT.—If the jury believe that the plaintiff, at the request of the officers of the bank and upon their promise that she should lose nothing, consented to keep the loss of the bonds quiet, her acquiescing in such silence by the officers of the bank cannot under such circumstances affect in any way her right to recover in this case.

ANSWER.—This point is answered in the affirmative. Certainly, if the deposit of the plaintiff's bonds were received by the cashier
104 with the knowledge and acquiescence of the officers and directors, and the bonds were lost by the gross negligence of the officers of the bank, her acquiescence in the policy of silence would not affect her right to recover.

SEVENTH POINT.—The measure of damages in this case is compensation to the plaintiff for the loss of her bonds, and this may be ascertained from the present value of such bonds with the coupons and the premium thereon from July 1st, 1873, to January 1st, 1877, added to such value.

ANSWER.—This point is affirmed.

105 *Defendant's points & answers.*

The court are respectfully requested to instruct the jury as follows, and to reduce their whole charge to writing and file the same of record:

FIRST POINT.—The First National Bank of Carlisle, Pa., was a corporation chartered under the acts of Congress of the United States, approved the 23d February, 1863, (3d June, 1864,) and its (their) supplements; and by the terms of their charter were not authorized to receive bonds and valuables on deposit for safe-keeping; and the act of the cashier in taking the bonds of plaintiff was not within the scope of his powers and duties as cashier, and therefore did not bind the bank, and plaintiff cannot recover.

ANSWER.—This point is refused.

SECOND POINT.—It is the uncontradicted evidence that the bonds of the plaintiff were left with the cashier of the First National Bank for safe-keeping; that no compensation was paid for their keeping, and that the bank derived no benefit from them in any way, and therefore in no event can the plaintiff recover the value of the bonds lost, unless she satisfy the juay by competent evidence that they were lost through the gross negligence of the officers of the bank.

ANSWER—This point is answered in the affirmative, and we so instruct you.

THIRD POINT.—The burden of proof is upon the plaintiff to prove that the bonds were lost through gross negligence; and the plaintiff must prove acts which show negligence or gross carelessness on the part of the bank in some respect affecting the safe custody of the bonds; and unless the plaintiff has shown to the satisfaction of the jury that
106 the bank was guilty of such carelessness as amounted to a breach of good faith, or to fraud, then the verdict should be for the defendant.

ANSWER.—Gross negligence is not the same thing as fraud. It generally justifies the suspicion of fraud, but it is not necessarily the same thing. There may be cases in which gross negligence and fraud cannot be discriminated in fact, but they are entirely distinct in law. Gross negligence may be entirely consistent with good faith and honesty of intention. And it would be a most mischievous error to confound it with fraud, for then, unless a jury should believe the party guilty of fraud, no laches would come up to the legal notion of gross negligence, so as to entitle the sufferer by the loss to a recovery. We cannot, therefore instruct you, as requested in this point, that unless the plaintiff has shown to the satisfaction of the jury that the bank was guilty of such carelessness as amounted to a breach of good faith or to fraud the verdict should be for the defendant.

Gross negligence is the want of slight diligence, and the measure of slight diligence is that degree of diligence which persons of less than common prudence, or, indeed, of any prudence at all, take of their own concerns.

But the defendant in this case having given an account of how the loss happened, the burden of proof is on the plaintiff to prove that the bonds were lost through gross negligence; and unless the plaintiff has proved to your satisfaction that the bank or its officers were grossly negligent in taking care of the bonds, your verdict should be for the defendant.

FOURTH POINT.—There is no evidence in this case from which the jury might infer gross negligence on the part of the bank, to the exclu-

sion of every other legitimate inference; and, therefore, as it is the duty of the plaintiff to prove gross negligence, she has not maintained the only proposition on which she is entitled to recover, and the verdict should be for the defendant.

ANSWER.—This point is refused. The question of gross negligence in this case is for the jury, and we submit it to you. Unless the evidence satisfies you that the plaintiff's bonds were lost through the gross negligence of the bank or its officers, your verdict should be for the defendant.

FIFTH POINT.—The uncontradicted testimony of the defendant being that the officers of the bank took the same care of the bonds of the plaintiff that they took of "their own property, and the best
107 possible care they could or knew how to take of them," and the jury would not be justified in finding defendant guilty of gross negligence.

ANSWER.—This point is refused. That the bailee of goods takes the same care of goods bailed that he does of his own, ordinarily repels the presumption of gross negligence. The desire to preserve one's own property from loss from any cause is, as a rule, so universal, that the mind rests with satisfaction on the evidence which shows the same care of the bailed property which the bailee took to save his own, unless it be shown that he was grossly negligent of both; and when this is done he is not excused, but held answerable. The question of gross negligence is for you under all the evidence, and we submit it to you. And, in determining the question of gross negligence, you will consider the evidence introduced to show that the officers of the bank took the same care of the plaintiff's bonds that they took of the property of a similar kind belonging to the bank, and that they took the best possible care they could or knew how to take of them. But still, as we have said, if they were grossly negligent of both, the defendant would not be excused or relieved from liability for loss resulting from such gross negligence.

SIXTH POINT.—It having been shown affirmatively on part of defendant by the testimony of the president and cashier of the bank that, in failing to make a general publication of the robbery of the bank, and to give immediate notice to the plaintiff of the loss of her bonds, they acted honestly, in good faith, and in accordance with their best judgment, as well as in accordance with the suggestions of Mr. Weir, a cashier of the Harrisburg National Bank of long experience, the jury would not be justified in drawing such an unfavorable conclusion from their conduct as would suffer them to charge defendant with gross negligence.

ANSWER.—Taking it for granted that the president and cashier of the bank, in failing to make a general publication of the robbery of the bank, and to give immediate notice to the plaintiff of the loss of her bonds, acted honestly, in good faith, and in accordance with their best judgments, as well as in accordance with the suggestions of Mr. Weir, a cashier of the Harrisburg National Bank, of long experience; yet, notwithstanding all this, the defendant would be charged with gross negligence if the act of the cashier in receiving the bonds was known
108 and acquiesced in by the officers and directors of the bank, and the bonds were lost by the gross negligence of the bank of its officers. And the failure to announce the robbery immediately after its discovery, and during the time that intervened before the plaintiff was informed of the loss, is fairly a subject for the consideration of the jury, in connection with the other evidence, in determining the question of gross negligence. The conduct of the officers of the bank in adopting the policy of silence, and their reasons and motive for such conduct,

may or may not be satisfactory to the jury in convincing them that no gross neglect was involved in what they did, and should be considered in connection with the other evidence in determining the question of gross negligence.

SEVENTH POINT.—If the jury believe that the officers of the bank acted in good faith and honestly in keeping silent the loss of the bonds, and the robbery of the bank, that they made honest efforts to trace the bonds of the plaintiff; and in everything they did on the subject of the loss acted on the advice and counsel of persons experienced in those matters; that they notified the U. S. Treasurer, assistant treasurer, and others of the loss and of the numbers of the bonds; that through the notice given by the bank officers to parties in Monmouth, Miss Graham learned that her bonds were lost, and came to inquire about them; that she was then informed that her government bonds were also lost, and was told of the policy agreed upon, to keep silent about the robbery, and that she acquiesced in that policy, then she should not be allowed to set up the maintenance of that policy as a ground of gross negligence; and if the jury believe that this policy of silence did not tend to cause the loss of the plaintiff's bonds they should not regard it in considering the question of negligence.

ANSWER.—If the jury find the facts to be as stated in this point, one of these facts being that Miss Graham, the plaintiff, acquiesced in the policy of silence about the robbery, then we say to you that she should not be allowed to set up the subsequent maintenance of that policy as a ground of gross negligence. And if the jury believe that this policy of silence did not tend to cause the loss of the plaintiff's bonds they should not regard it in considering the question of negligence.

EIGHTH POINT.—If the jury believe the evidence of Charles H. Hepburn and John G. Orr, that the bonds were stolen in some way and by some person unknown to them; that at the same time a large
109 amount of money belonging to the bank, and kept in the same manner as the bonds of Miss Graham, was also stolen; that the bonds of the plaintiff were kept with the same care that the money and property of the bank and of the officers were kept, this is strong evidence to rebut any inference of gross negligence, and strong proof that the officers of the bank used ordinary care and diligence in the keeping of plaintiff's bonds; and if they did use such care the verdict should be for the defendant.

ANSWER.—This point is answered in the affirmative, unless you find that the officers of the bank were grossly negligent in their failure to announce the robbery immediately after its discovery and during the time that intervened before the plaintiff was informed of the loss, and that the plaintiff's bonds were lost by such gross negligence.

Verdict and judgment.

110 In the court of common pleas of Cumberland Co. No. 151. Nov. T., 1873.

FANNIE L. GRAHAM
vs.
FIRST NAT. BANK CARLISLE, PA.

And now, to wit, March 15th, 1877, jury called, &c., who being severally ballotted for, elected, empannelled, sworn, or affirmed, do say that

they find for the plaintiff five thousand four hundred & twenty-seven dollars and ninety-five cents.

March 21st, 1877.

Judgment.

111 Among the records and proceedings of the supreme court of Penn'a, sitting in and for the middle district at Harrisburg to No. 186 of May term, 1877, it is contained as follows:

Docket entry.

Writ of error to the court of common pleas of Cumberland County.

FIRST NATIONAL BANK OF CARLISLE, PLAINTIFF in error, & defendant below,
vs.
FANNIE L. GRAHAM, DEFENDANT IN ERROR, & plaintiff below. } No. 151. Jan. T., 1873.

April 17th, 1877.—Præcipe and affidavit for writ of error filed.

Same day.—Exit writ of error returnable second Monday of May, 1877.

May 14th, 1877.—Assignments of error filed.

Same day.—Record returned & filed.

June 22d, 1877.—Called for argument and argued.

And now, to wit, June 26th, 1877, this cause came on to be heard; and, on due consideration thereof, it is ordered that the judgment
112 of the court below be confirmed, this court being of opinion that the rulings of the learned judge of the court below, complained of in the assignments of error, were in all respects in conformity with law.

Judgment affirmed.

Per curiam.

July 19th, 1877.—Petition for writ of error to the Supreme Court of the United States, citation from the Supreme Court of the United States, and writ of error from same allowed by Hon. Joseph P. Bradley, associate justice of the Supreme Court of the United States received and filed.

Same day.—Writ of error bond in five hundred dollars, approved by Hon. Joseph P. Bradley, A. J., received and filed.

Same day.—Copy of writ of error for defendant in error received.

Certified from the record, Harrisburg, Pa., July 30, 1877.

SEAL OF THE SUP. CT. OF PA. MID. DIST. ROB'T SNODGRASS, *Proth'y.*

113 In the supreme court of Pennsylvania, for the middle district.

FIRST NATIONAL BANK OF CARLISLE, PA., DEFENDANT below, plaintiff in error,
vs.
FANNIE L. GRAHAM, PLAINTIFF BELOW, DEFENDANT in error.

Issue writ of error to the court of common pleas of Cumberland County to bring up the record and proceedings in a certain case depend-

ing therein to No. 151, of January term, 1874, returnable to May term, 1877.

S. HEPBURN, JR.,
W. F. SADLER.
Attorney for Plaintiff in Error.

To R. SNODGRASS, Esq.,
Proth'y Supreme Court of Pa., Middle District.

CUMBERLAND COUNTY, *ss:*

W. F. Sadler, the receiver of the plaintiff in error, being duly sworn according to law, deposes and says that the writ of error in this case is not intended for delay.

W. F. SADLER.

Sworn, subscribed before me this 16' day of April, 187'.

(Endorsed:) No. 186. May term, 1877. Filed April 17, 1877.

114 In the supreme court of Pennsylvania, in and for the middle district, set.

The commonwealth of Pennsylvania to the justices of the court of common pleas for the county of Cumberland, greeting:

Because in the record and process, and in rendering the judgment in a certain plaint, which was in our said court, before the judges of the same court, by our writ, between First National Bank of Carlisle, Penn'a, plaintiff in error, and Fannie L. Graham, defendant in error, No. 151, Nov. T., 1873, as it is said, manifest error hath intervened, to the great damage of the said plaintiff in error, as, by the complaint of the same plaintiff in error, we have received information, we, willing that if any error be therein, it should be corrected, and that speedy justice be done to the parties in this part, do command you, that if judgment, as it is said, be rendered in the said plea, then the record and process and all things touching the same, under your seals, distinctly and openly, you have before the justices of our supreme court of Pennsylvania, at a supreme court to be held at Harrisburg, in and for the middle district of said commonwealth, on the 2nd Monday, day of May next, and this writ, that the record and process aforesaid being inspected, we may further cause to be done what of right and according to our laws and customs ought.

Witness the honorable Daniel Agnew, LL. D., chief justice of our said supreme court, at Harrisburg, the 17th day of Ap'l, in the year of our Lord one thousand eight hundred and seventy-seven, and of the commonwealth 101st.

{ SEAL OF THE SUPREME COURT OF PENN'A, IN & FOR THE MID. DIST. }

ROBT SNODGRASS,
Prothonotary,
Per C.

Allowed.

115 The record and process and all things touching the same, so full and entire as before us they remain, to the honorable the judges of the supreme court of the commonwealth of Pennsylvania, sitting in and for the middle district, we certify and send as within we are commanded.

[L. S.]

M. C. HERMAN,
President Judge.

(Indorsed:) No. 151, Nov. T., 1873, C. C. pleas. No. 186, May term, 1877, supreme court of Pennsylvania, middle district. First Nat'l Bank Carlisle, Penn'a, plaintiff in errror, vs. Fannie L. Graham, defendant in error. Writ of error to the court of common pleas for the county of Cumberland, returnable the 2d Monday, day of May, 1877. Rule on defendant in error to appear and plead on the return day of the writ.

N. B.—10 days' notice to the parties or their counsel below is necessary to compel an appearance.

Filed in sup. c't May 14, 1877.

ROBERT SNODGRASS, *Proth'y.*

Filed in com. pleas, 18 April, 1877.
Hepburn & Sadler.

116 *Assignments of error.*

It is respectfully submitted that the court below erred, as set forth in the following assignments of error:

FIRST ERROR.—In admitting plaintiff's offer, as follows:

The plaintiff now offers in evidence a receipt in writing upon paper with the business heading of the First National Bank of Carlisle, Penna., signed by Charles H. Hepburn, cashier, to the plaintiff, for $4,000 in U. S. 5-20 bonds in 1867, left in said bank October 22, 1868, for safe-keeping, the bonds to be returned on return of said receipt, to be followed by evidence of a demand for these bonds and that they were not returned to the plaintiff, and that such deposits were made in the bank known to its directors and acquiesced in.

Objected to.

The receipt of the cashier offered is not evidence to charge the defendant, a bank incorporated under the provisions of the act of Congress passed 25th day of February, 1863, known as the national-currency act.

2d. The taking of bonds or other valuables for safe-keeping is not within the powers conferred by the act of Congress on national banks; nor is it within the power of the cashier to bind the bank by such a receipt.

3d. The act of the cashier being an individual act, not within the line of his duty, and the receiving of the bonds by the bank for safe-keeping being ultra vires, the assent of the directors creates no liability.

Objection overruled. Evidence admitted. Defendant excepts and bill sealed.

[L. S.] M. C. HERMAN.

SECOND ERROR.—In admitting plaintiff's offer as follows:

The plaintiff now offers in evidence a book of the First National Bank of Carlisle, Penn'a, entitled on the back "Collections Received First National Bank Carlisle," but without any heading to any of its pages, with notes for collection entered in the fore part of it and in the latter part thereof, containing entries of bonds, &c., for safe keeping, with a number of receipts written on the business paper of the bank and signed by its cashier, lifted and pasted in the back of said book, and this for the purpose of showing to what extent the bank was in the habit of receiving such deposits, to be followed by evidence that this habit was known to the directors and acquiesced in.

Objected to.

That the entries offered are not, properly speaking, any part of the bank book entitled "Collections Received." That book is a book regularly kept from October 30, 1865, showing the names of the makers, the names of the payees, endorsers, and holders, the dates of the notes, time to run, amount and dates of maturity, and when notes were paid, or protested and returned to the holder, these collections being regularly numbered and kept continuously from October, 1865, to October 21, 1873, without any intermission or interruption, and the book being a necessary record of part of the workings of the bank.

117 The portion offered in evidence is no part of the above described record, and not in any way connected with it, but consists of two and one-third folios in the back part of the same book and between the same covers, which were used by the cashier to make entries of bonds or valuables left for safe-keeping, and so kept that the entries would not be notice to anybody examining the collections to be made.

The offer is not evidence for the purpose stated.

Objections overruled. Evidence admitted. Defendant excepts and bill sealed.

[L. S.] M. C. HERMAN.

THIRD ERROR.—In permitting plaintiff to ask on cross-examination of defendant's witness, as proposed in the following offer:

The witness on the stand having testified on his examination in chief that the bonds were kept in the vault of the bank, the plaintiff on cross-examination proposes to ask the witness in reference to the location of the vault, the approaches to it both from the outside of the building and from the inside; how the doors leading to it were kept, whether open or shut; whether the windows, if any, by which an entrance to it could have been effected, were kept closed and fastened or otherwise, and everything about the manner of keeping the vault and safe of the bank and the approaches to them, and this for the purpose of ascertaining whether there was any negligence in the manner of keeping the bonds and valuables of the bank and others.

Objected to.

That if evidence at all, this should have been offered in chief. It is not a cross-examination.

2d. The construction of the vault and of the bank building is immaterial. The plaintiff must have known of its construction, and as the bonds were put there at her request and kept without compensation she cannot now object that the construction was not such as suited her, or the best possible for the purpose.

3d. It is irrelevant.

Objections overruled. Evidence admitted. Defendant excepts, and bill sealed.

[L. S.] M. C. HERMAN.

FOURTH ERROR.—In refusing to order a judgment of nonsuit

118 to be entered when requested so to do by the defendant, under the authority of the act of 11th March, A. D. 1875.

The plaintiff having closed her case, the defendants move the court for a compulsory nonsuit, on the ground that the plaintiff has given no evidence to sustain her action.

Per Curiam: We think the evidence on part of the plaintiff now before us raises a question of negligence which must be submitted to the jury. The motion for a compulsory nonsuit overruled.

Defendant excepts, and bill sealed.

[L. S.] M. C. HERMAN.

FIFTH ERROR.—In affirming plaintiff's first point; because there was no evidence of gross negligence, and this question should not have been submitted to the jury.

PLAINTIFF'S FIRST POINT.—If the jury believe that the plaintiff deposited the bonds for the value of which this suit is brought with the defendant for safe-keeping, and took the receipt of the cashier in evidence for the same, and that the cashier of the bank was in the habit of receiving bonds and other valuables for safe-keeping in the bank, and this habit was known to the directors and acquiesced in by them, and that the bonds of the plaintiff were lost by the gross negligence of the defendant's officers, then the verdict of the jury should be for the plaintiff.

ANSWER.—This point is answered in the affirmative, and we so instruct you.

SIXTH ERROR.—In affirming plaintiff's 2d point, for the same reason.

SECOND POINT.—Gross negligence is a fact, from all the circumstances of the case, exclusively for the jury, and is the want of such care in keeping the bonds as bankers or holders of such securities as a class use in keeping such property, and if the jury believe that the defendant was grossly negligent in the care of the plaintiff's bonds, and they were lost in consequence of such negligence, then their verdict should be for the plaintiff.

ANSWER.—This point is answered in the affirmative. We have explained to you the meaning of gross negligence, which is the want or omission of slight diligence, and the measure of slight diligence is that degree of diligence which persons of less than common pru-
119 dence, or, indeed, of any prudence at all, take of their own concerns.

SEVENTH ERROR.—In affirming plaintiff's 3d point.

PLAINTIFF'S THIRD POINT.—If the defendant took the same care of plaintiff's property that it did of its own, but was grossly negligent of both, this will not excuse the defendant from liability to the plaintiff for the loss sustained by such gross negligence.

ANSWER.—This point is answered in the affirmative, provided you find that the act of the cashier in receiving the deposit of the plaintiff's bonds was known and acquiesced in by the officers and directors of the bank.

EIGHTH ERROR.—In affirming plaintiff's 4th point there was no "other evidence," nor any evidence, from which gross negligence could be inferred.

PLAINTIFF'S FOURTH POINT.—The fact that no announcement was made to plaintiff of the loss of her bonds for two or three weeks after the alleged loss occurred, and then only upon making inquiry of cashier for her bonds, is fairly a subject for the consideration of the jury in determining the question of gross negligence, and it is for them to weigh it in connection with the other evidence in deciding the question of gross negligence on the part of the defendant.

ANSWER.—This point is answered in the affirmative. You will, however, remember the testimony of the witnesses as to the length of time that intervened between the time of the alleged robbery and the notice to Miss Graham of the loss. Charles H. Hepburn says it was about eight or ten days. Miss Graham says she received notice of the loss the last of August. It is alleged that the loss occurred on the 5th August.

The fact that no announcement was made to the plaintiff in the interval of time between the time of the alleged loss and the time she actu-

ally did receive notice of the loss, and that the loss was only then announced to her upon her inquiring of the cashier for her bonds, is fairly a subject for the consideration of the jury in determining the question of gross negligence, and it is for the jury to weigh it in connection with the other evidence in deciding the question of gross negligence on the part of the defendant.

NINTH ERROR.—In the affirming plaintiff's 5th point, and their answer thereto, because it was the uncontradicted evidence that the bonds of plaintiff were kept in the safe in the inner vault, as articles of the greatest value are usually kept, and there was no evidence of negligence.

120

PLAINTIFF'S FIFTH POINT.—That in determining the question of gross negligence by a bailee, the jury may take into consideration the value of the deposit, and that care which would not amount to gross negligence in keeping a deposit of trifling value might amount to gross negligence in taking care of a deposit of the value of thousands of dollars and the loss of which would be irreparable.

ANSWER.—This point is answered in the affirmative and we so instruct you.

The value of the deposit is an important ingredient to be taken into consideration upon every question of negligence; for that may be gross negligence in the case of a parcel of extraordinary value which in the case of a common parcel would not be so.

TENTH ERROR.—In refusing to charge as requested in defendant's 1st point.

DEFENDANT'S FIRST POINT.—The First National Bank of Carlisle, Pa., was a corporation chartered under the acts of Congress of the United States, approved the 23d February, 1863 (3d June, 1864), and its (their) supplements; and by the terms of their charter were not authorized to receive bonds and valuables on deposit for safe-keeping; and the act of the cashier in taking the bonds of plaintiff was not within the scope of his powers and duties as cashier, and therefore did not bind the bank, and plaintiff cannot recover.

ANSWER.—This point is refused.

ELEVENTH ERROR.—In their answer to defendant's 3d point.

DEFENDANT'S THIRD POINT.—The burden of proof is upon the plaintiff to prove that the bonds were lost through gross negligence; and the plaintiff must prove acts which show negligence or gross carelessness on the part of the bank in some respect affecting the safe custody of the bonds; and unless the plaintiff has shown to the satisfaction of the jury that the bank was guilty of such carelessness as amounted to a breach of good faith, or to fraud, then the verdict should be for the defendant.

ANSWER.—Gross negligence is not the same thing as fraud. It generally justifies the suspicion of fraud, but it is not necessarily the same thing. There may be cases in which gross negligence and fraud cannot be discriminated in fact, but they are entirely distinct in law. Gross negligence may be entirely consistent with good faith and honesty of intention. And it would be a most mischievous error to confound it with fraud, for, then, unless a jury should believe the party guilty of fraud, no laches would come up to the legal notion of gross negligence, so as to entitle the sufferer by the loss to a recovery. We cannot, therefore, instruct you as requested in this point, that unless the plaintiff has shown to the satisfaction of the jury that the bank was guilty of such carelessness as amounted to a breach of good faith or to fraud, the verdict should be for the defendant.

121

Gross negligence is the want of slight diligence, and the measure of slight diligence is that degree of diligence which persons of less than common prudence, or, indeed, of any prudence at all, take of their own concerns.

But the defendant in this case having given an account of how the loss happened, the burden of proof is on the plaintiff to prove that the bonds were lost through gross negligence, and unless the plaintiff has proved to your satisfaction that the bank or its officers were grossly negligent in taking care of the bonds, your verdict should be for the defendant.

TWELFTH ERROR.—In refusing to charge as requested in defendant's 4th point.

DEFENDANT'S FOURTH POINT.—There is no evidence in this case from which the jury might infer gross negligence on the part of the bank, to the exclusion of every other legitimate inference; and, therefore, as it is the duty of the plaintiff to prove gross negligence, she has not maintained the only proposition on which she is entitled to recover, and the verdict should be for the defendant.

ANSWER.—This point is refused. The question of gross negligence in this case is for the jury, and we submit it to you. Unless the evidence satisfies you that the plaintiff's bonds were lost through the gross negligence of the bank or its officers, your verdict should be for the defendant.

THIRTEENTH ERROR.—In refusing to charge as requested in defendant's 5th point.

DEFENDANT'S FIFTH POINT.—The uncontradicted testimony of
122 the defendant being that the officers of the bank took the same care of the bonds of the plaintiff that they took of "their own property, and the best possible care they could or knew how to take of them," and the jury would not be justified in finding defendant guilty of gross negligence.

ANSWER.—This point is refused. That the bailee of goods takes the same care of goods bailed that he does of his own, ordinarily repels the presumption of gross negligence. The desire to preserve one's own property from loss from any cause is, as a rule, so universal that the mind rests with satisfaction on the evidence which shows the same care of the bailed property which the bailee took to save his own, unless it be shown that he was grossly negligent of both, and when this is done he is not excused, but held answerable. The question of gross negligence is for you under all the evidence, and we submit it to you. And in determining the question of gross negligence you will consider the evidence introduced to show that the officers of the bank took the same care of the plaintiff's bonds that they took of the property of a similar kind belonging to the bank, and that they took the best possible care they could or knew how to take of them. But still, as we have said, if they were grossly negligent of both, the defendant would not be excused or relieved from liability for loss resulting from such gross negligence.

FOURTEENTH ERROR.—In their answer to defendant's 8th point.

DEFENDANT'S EIGHTH POINT.—If the jury believe the evidence of Chas. H. Hepburn and John G. Orr, that the bonds were stolen in some way and by some person unknown to them; that at the same time a large amount of money belonging to the bank, and kept in the same manner as the bonds of Miss Graham, was also stolen; that the bonds of the plaintiff were kept with the same care that the money and property of the bank and of the officers were kept, this is strong evidence to

rebut any inference of gross negligence, and strong proof that the officers of the bank used ordinary care and diligence in the keeping of plaintiff's bonds, and if they did use such care, the verdict should be for the defendant.

ANSWER.—This point is answered in the affirmative, unless you find that the officers of the bank were grossly negligent in their failure to announce the robbery immediately after its discovery and during
123 the time that intervened before the plaintiff was informed of the loss, and that the plaintiff's bonds were lost by such gross negligence.

FIFTEENTH ERROR.—In saying in their general charge:

"To justify a recovery against the defendants in this case the jury must be satisfied from the evidence that the plaintiff's bonds were received by the cashier for safe-keeping, with the knowledge and acquiescence of the officers and directors of the bank, and that the bonds were lost by the gross negligence of the bank or its officers.

"If the cashier of the bank was in the habit of receiving such deposits for safe-keeping, and this habit was known and acquiesced in by the officers and directors, then their knowledge of the receipt of the deposit of the plaintiff's bonds into the bank for safe-keeping, and their acquiescence in the reception thereof, would be presumed."

124 *Judgment.*

In the supreme court of Penna., in and for the middle district, to No. 186, May term, 1877.

Writ of error to the court of com. pleas of Cumberland County.

FIRST NAT. BANK CARLISLE, PA., PLAINTIFF in error and defendant below, *vs.* FANNIE L. GRAHAM, DEFENDANT IN ERROR and plaintiff below.	No. 151. Jan. T., 1873.

And now, to wit, June 26th, 1876, this cause came on to be heard, and, on due consideration thereof, it is ordered that the judgment of the court below be affirmed; this court being of opinion that the rulings of the learned judge of the court complained of in the assignments of error were in all respects in conformity with law.

Judgment affirmed.

Per curiam.

DANIEL AGNEW, *C. J.*

125 And now here, on this day, to wit, July 19th, 1877, the said The First National Bank of Carlisle produced to the said supreme court of Penna. here the writ of the United States of America for the correcting of errors of and upon the premises, commanding the record and proceedings aforesaid of the judgment aforesaid so as aforesaid rendered, with all things concerning the same, to be transmitted to the Supreme Court of the United States, to be held at the city of Washington on the second of October next, which writ of error is in the words and of the tenor following, to wit:

126 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Pennsylvania, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The First National Bank of Carlisle, Pennsylvania, Wilbur F. Sadler, receiver, plaintiff in error, and Fannie L. Graham, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such, their
127 validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then, under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the thirteenth day of July, in the year of our Lord one thousand eight hundred and seventy-seven.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by—

JOSEPH P. BRADLEY,
Associate Justice Sup. C't U. S.

JULY 13TH, 1877.

(Indorsed:) July 19th, 1877. Filed in the office of the prothonotary of the supreme court of Pennsylvania for the middle district. Rob't Snodgrass, proth'y.

128 In pursuance whereof, and according to the form and effect of the act of Congress in such case made and provided, a transcript of the record and proceedings of the judgment aforesaid, so as aforesaid rendered, with all things relating to the same, together with the said writ of error, are hereby transmitted to the said Supreme Court accordingly.

129 Know all men by these presents, that we, John Jay Knox and George H. Williams, are held and firmly bound unto Fannie L.

Graham in the full and just sum of five hundred dollars, to be paid to the said Fannie L. Graham, her certain attorney, executors. administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this thirteenth day of July, in the year of our Lord one thousand eight hundred and seventy-seven.

Whereas lately, at a term of the supreme court of the State of Pennsylvania, in a suit depending in said court, between The First National Bank of Carlisle, Wilbur F. Sadler, receiver, & Fannie L. Graham, judgment was rendered against the said First National Bank of Carlisle, and the said First National Bank of Carlisle having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Fannie L. Graham citing and admonishing her to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said First National Bank of Carlisle, Wilbur F. Sadler, receiver, shall prosecute said writ of error to effect, and answer all costs, if any, & fail to make its plea good, then the above obligation t› be void, else to remain in full force and virtue.

Sealed and delivered in presence of—

[L. S.] (Signed) JNO. JAY KNOX.
[L. S.] (") GEO. H. WILLIAMS.

Approved by—

[L. S] (Signed) JOSEPH P. BRADLEY,
Asso. Justice Sup. C't U. S.

(Indorsed:) July 19. 1877. Filed in the office of the prothonotary of the supreme court of Pennsylvania for the middle district. Rob't Snodgrass, prot'y.

130 To the honorable Joseph P. Bradley, justice of the Supreme Court of the United States of America:

The petition of Wilbur F. Sadler, receiver of the First National Bank of Carlisle, Pa., respectfully shows that on the 13th October, A. D. 1873, a suit was instituted in the court of common pleas of Cumberland County and State of Pennsylvania, wherein Fannie L. Graham was plaintiff and the said First National Bank of Carlisle, Pa., was defendant; that such proceedings were had thereon that on the 26th day of June, A. D. 1877, a final judgment was rendered in said suit in the supreme court of the State of Pennsylvania, for the middle district (said suit being No. 186, May term, 1877, in said court), in favor of the plaintiff and against the said defendant, for five thousand four hundred and twenty-seven $\frac{75}{100}$ dollars ($5,427.75), with interest from the 15th March, A. D. 1877, the said supreme court being the highest court of law or equity in said State; that in said suit was drawn in question the construction of a statute of the United States, and the decision of the said supreme court of Pennsylvania is against the right, privilege, or exemption specially set up and claimed by the said First National Bank of Carlisle, Penn'a, under such statute, to wit, the statute creating national banks and its supplements, as appears by the record in said case.

Your petitioner, therefore, believing that in the rendering of said judgment, as above stated, error has intervened, prays your honor to al-

low a writ of error to issue to remove said cause to the Supreme Court of the United States, that said court may further cause to be done to correct said error what *is* right and according to the customs and laws of the United States ought to be done.

And he will ever pray, &c.

W. F. SADLER.

STATE OF PENNSYLV.,
Cumberland County:

Before me, a notary public in & for said county & State,
131 W. F. Sadler, receiv. 1st Nat. B'k, Carlisle, Pa., who, being duly sworn, deposes & says that above petition is true in so far as facts therein contained are of his own knowledge, and where they are from information and belief he believes them to be true.

W. F. SADLER.

Sworn & subscribed before me this 5th Jan'y, 1877.
[SEAL.] J. M. ALLEN,
N. Public.

(Indorsed:) First National Bank of Carlisle, Pa., vs. Fannie L. Graham. Petition for citation, &c. July 19, 1877. Filed in the office of the prothonotary of the supreme court of Penn'a, for the middle district. Rob't Snodgrass, proth'y.

132 The United States of America to Fannie L. Graham, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Pennsylvania, wherein the First National Bank of Carlisle, Pa., William F. Sadler, receiver, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Joseph P. Bradley, associate justice of the Supreme Court of the United States, this 13th day of July, in the year of our Lord one thousand eight hundred and seventy-seven.

JOSEPH P. BRADLEY,
Asso. Justice Sup. C't U. S.

On this eighteenth day of July, in the year of our Lord one thousand eight hundred and seventy-seven, personally appeared B. K. Goodyear, dep'y sh'ff of Cumb'd Co., Pa., before me, the subscriber, J. R. Irvine, deputy prothonotary of court of common pleas of Cumberland County, Penn'a, & *and* makes oath that he delivered a true copy of the within citation to Fannie L. Graham.

B. K. GOODYEAR,
Dep'y Sh'ff.

Sworn to and subscribed the 18th day of July, A. D. 1877.
J. R. IRVINE,
Dep'y Proth'y.

(Indorsed:) July 19, 1877. Filed in the office of the prothonotary of the supreme court of Penn'a, for the middle district. Rob't Snodgrass, proth'y.

133 STATE OF PENNSYLVANIA, *ss:*

I, Robert Snodgrass, prothonotary of the supreme court of Penn'a in and for the middle district, do hereby certify that the foregoing, contained on pages 1 to 132, inclusive, is a full, true, and correct copy of the record and proceedings in the supreme court of Penn'a in and for said district, the highest court of law and equity in the said State of Penn'a, in the cause lately depending therein to No. 186 of May term, 1877, in said district, wherein the First National Bank of Carlisle, Penn'a, was plaintiff in error and Fannie L. Graham was defendant in error, as appears from the record thereof remaining in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the said supreme court, at Harrisburg, Pa., this 30th day of July, one thousand eight hundred & seventy-seven.

[SEAL.] ROB'T SNODGRASS,
Proth'y Sup. C't Pa., Mid. Dist.

(Indorsement on cover:) No. 166. The First National Bank of Carlisle, Pennsylvania, Wilbur F. Sadler, receiver; pl'ff. in error, vs. Fannie L. Graham. Pennsylvania Sup. Court. Filed 13th August, 1877.

IN THE

Supreme Court of the United States.

THE FIRST NATIONAL BANK OF CARLISLE, *Plaintiff in Error*,		No. 166,
vs,	}	October Term,
FANNIE L. GRAHAM, *Defendant in Error.*		A. D. 1879.

The following are the material facts of the case:

On the 22d of October, A. D. 1868, Fannie L. Graham left with the cashier of the bank, for safe keeping, four $1,000 U. S. 5-20 bonds. This is a copy of his receipt:

"CARLISLE, *Oct.* 22, 1868.

"Miss F. L. Graham has left in the bank, for safe keeping, four thousand dollars, ($4,000,) in U. S. 5-20 bonds of 1867, to be returned upon the return of this receipt.

"CHAS. H. HEPBURN, *Cashier.*"

The keeping of these bonds was for the accommodation of Miss Graham, and without any advantage whatever to the bank.

On the 5th of August, 1871, these bonds, with money and valuable papers belonging to the bank, were stolen from its vaults.

The bank was a National Bank, organized under the acts of Congress of February 25, 1863, and June 3d, 1864, and their supplements.

On the trial of the cause, in the Cumberland Common Pleas, before the court and a jury, plaintiff in error objected to the said receipt, on the ground that it was not evidence to establish the liability of a National Bank for a deposit as therein specified, but the objection was overruled, and the receipt was admitted in evidence.

Plaintiff in error also, upon said trial, requested the court to instruct the jury as follows:

"The First National Bank of Carlisle, Pa., was a corporation chartered under the acts of Congress of the United States, approved the 23d February, 1863, (3d June, 1864,) and its (their) supplements; and by the terms of their charter were not authorized to receive bonds and valuables on deposit for safe-keeping; and the act of the cashier in taking the bonds of plaintiff was not within the scope of his powers and duties as cashier, and therefore did not bind the bank, and plaintiff cannot recover."

Which request was refused by the Court. Exceptions were duly taken.

Verdict and judgment for Graham for $5,427.95.

Upon a writ of error this judgment was affirmed by the Supreme Court of the State.

The bank is in the hands of a receiver, by whom this writ is prosecuted.

Assignment of Errors.

The Supreme Court of the State erred in holding that said receipt was admissible in evidence to charge the bank with the value of the bonds therein described.

2. Said Court erred in holding and deciding that said instructions to the jury were properly refused by the Common Pleas.

3. Said Supreme Court erred in affirming the said judgment of the said Common Pleas.

Argument.

It is objected by defendant in error that this Court has no jurisdiction. Sec. 709 of the Revised Statutes, among other things, provides that the judgment of a Supreme Court of a State is re-examinable here where an "immunity" is set up and claimed by a party under a statute of the United States and the decision of the State court is against the immunity thus claimed.

Webster defines "immunity" to be "freedom or exemption from obligation." Now the bank claims that under the act of Congress of June 3, 1864, under and by which it was organized, it is exempt from any obligation to pay for the bonds named in said receipt.

Mr. Justice Davis, in *Freeman vs. Nicoll, 8 Wallace 56*, says: "And it need not appear that the State court erred in its judgment. It is sufficient to confer jurisdiction that the question was in the case, was decidedly adversely to the plaintiff in error, and that the court was induced by it to make the judgment that it did." Is it not perfectly clear that there is in this case the question as to whether or not the bank is exempted from liability in this suit under the act of June 3d, 1864?

The question was not only in the case, but it was necessarily decided against plaintiff in error in the court below. There was no way in which that court could render judgment for the plaintiff there, without deciding against the "immunity" set up by the bank under the statute.

Whether a bank is liable or not upon an alleged obligation, is a question always referrible to its charter. The act of Congress of June 3d, 1864, is the charter for this bank, and therefore it may claim, that under the said charter it is not liable upon the alleged obligation in this case.

Whether the claim of the bank is good or bad, is not the question, but the question is, whether the decision of the courts below fairly involved the construction of an act of Congress adverse to such claim.

In the following cases this Court took jurisdiction of cases brought here from the State courts involving questions arising under the National Banking Act.

Bank of Philadelphia *vs.* Polequidqua Bank, 14 Wallace, 303.
National Bank *vs.* Colby, 21 Wallace, 609.
Farmers' National Bank *vs.* Dearing, 1 Otto, 29.
First National Bank of Charlotte *vs.* National Exchange Bank of Baltimore, 2 Otto, 122.
National Bank *vs.* Matthews, 8 Otto, 621.

Section 5133 of the Revised Statutes, Act of June 3, 1864, provides that "Associations for carrying on the business of *banking* under this title may be formed," &c. Section 5136 declares that upon filing the articles of association and organization certificate, the association "shall have power" among other things, "to exercise by its board of directors or duly authorized officers or agents subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt, by receiving deposits, by buying and selling exchange, coin and bullion, by loaning money on personal security, and by obtaining, issuing, and circulating notes according to the provisions of this article." The foregoing is a complete enumeration of the powers of a National Bank, after it is fully organized, as conferred by said Act of Congress. Now, this enumeration is a limitation upon the power of a National Bank or it is not. If it is, then it has no power to do the business of warehousemen or safe-deposit companies. If it is not, then a National Bank may engage in manufacturing or in the business of a forwarding and commission merchant. One kind of business outside of banking is as much open to it as another. If the limitation is not such as said section prescribes, then there is no limitation. The safe keeping of valuable personal effects is a distinct business in this country. Companies are organized, and buildings especially constructed for that purpose in most of our large towns and

cities. There is no legitimate connection between this business and the business of banking. Indeed, the keeping of valuables by a bank without charge, as in this case, is, if possible, less like banking than the ordinary business of a deposit company, by whom the safe keeping is for pay.

Various considerations appeal to the courts to enforce the limitation upon National Banks prescribed by the statute.

1. Moneyed corporations, with special facilities conferred by Congress for the acquisition of wealth and power, should not be allowed to absorb property and all kinds of business foreign to their nature and object.

2. National Banks should not be permitted to engage in the business of keeping bonds, diamonds, jewelry, plate or anything of the kind on special deposit, because they add to the other temptations by which banks are exposed to thieves and burglars, and impose extra hazards upon those who as depositors keep their accounts with the bank.

3. The position of defendants in error ought not to be sustained, because if it is, when a bank fails, as in this case, the legitimate depositors who keep their accounts with the bank will be compelled to share its assets with those who do business with it as a safe-deposit company, or as a company engaged in any other pursuit foreign to the business of banking.

This suit is founded upon a contract made, as it is alleged, between the cashier of said bank and the said Fannie L. Graham, and described in the said receipt, which contract it is alleged, the cashier and president of said bank did not perform, though often requested, &c., to plaintiff's damage, &c.

This contract was *ultra vires*, and does not bind the bank.

"It is axiomatic," says the New York Court of Appeals, in National Bank *vs.* Ocean Bank, 6 New York, 294, "that

a corporation can make no contracts and do no acts except such as are authorized by its charter, either expressly or as incidental to its existence."

That the contract above set forth is expressly authorized by the National Banking Act will not be pretended.

That it is not incidental to the existence or business of a National Bank is apparent from the fact that such a bank can fulfill all the objects of its creation, and perform all its functions without going into the business of keeping valuable property on special deposit for nothing.

When a thing is against the spirit and policy of the banking act of 1864, a permission in favor of it cannot be implied from general expressions.

Ballard *vs.* Bank, 18 Wallace, 589.

Mr. Chief Justice Waite says, in the case of the First National Bank of Charlotte *vs.* National Exchange Bank of Baltimore, 2 Otto, 122, speaking of the said act of 1864, "Dealing in stocks is not expressly prohibited, but such a prohibition is implied from the failure to grant the power."

Wiley *vs.* First National Bank of Brattleboro', 47 Vermont, 546, is a case exactly in point. The following is a copy of the receipt given in that case:

"The First National Bank of Brattleboro',
"Brattleboro' Vt., *Jan'y 8, 1869.*

"Lucius L. Wiley has deposited in this bank twenty-four hundred dollars of 5-20s 1867, for safe keeping as a special deposit.

"S M. WAITE, *C.*"

The reasoning of Judge Wheeler (now U. S. District Judge,) in that case is exhaustive, and seems to be conclusive against the right of recovery in this case. He says among other things:

"A bank is an institution for the custody, loaning, exchange or issue of money, and for facilitating the transmission of funds by drafts or bills of exchange.—*Webster's Dict., Burrill's Law Dict., Bouvier's Law Dict., Tit. Bank.*

"In authorizing the formation of banks under the act, the framers of it must have had in view what the objects of banks were defined to be and what their powers were understood to be; and, with those things in view, after providing how the banks might be organized and officered, make contracts, sue, and defend, enacted that they might exercise under that act 'all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; by obtaining, issuing and circulating notes according to the provisions of this act.' Deposits in banks had then long been well understood to mean the placing of money in a bank, to the credit of the depositor, to be used by the bank as its own, and be drawn against by, or paid to, the depositor at his pleasure, and not the delivery of either money, securities, or other property to be specifically kept and redelivered. These latter had been equally well known as special deposits. [*Story, Bail §88. Foster vs. Essex Bank, 17 Mass., 497.*] The receiving of such special deposits is not in any sense necessary to carrying on the business of banking. If made of money even, no use could be made of it whatever, nor could any profit be derived from it unless charge should be made for the custody, and then that business would be more like that of a warehouseman than that of a banker. The receiving such general deposits is a part of ordinary banking business, and power to receive them is necessary to carrying on that part and useful to carrying on others; and when Congress granted to the banks the incidental powers necessary to carry on the business of banking by receiving deposits, the kind of deposits that the settled meaning of the term, used in such connection, would apply to, and the kind that would answer the description as to being necessary, must have been intended. The express grant of powers mentioned is, on familiar principles, an implied exclusion of all not mentioned. It has been urged with plausibility, for the plaintiff, that the mention of special deposits in section 46 of the act shows that such were meant to be included among those that the banks, by section 8, are authorized to receive. But the provisions of section 46 are made solely with reference to winding up the affairs of banks after their business has been stopped, and not at all with reference to the prosecution of it; and this

part of the section has especial reference to restricting, and not any to enlarging, their power. And then banks that would have deposits as security for loans might have their business stopped, and, if so, under the provision that they should not prosecute business except to receive and keep their money, they might be embarrassed about such special deposits, on payment of the debts without such a provision as that in section 46 authorizing the delivery of them. But, whatever else may have been the purpose of inserting that clause there, it seems plain that it was not intended to add to powers that had been so categorically set forth in another separate section as to indicate that all were intended to be named there."

In the case of the National Bank of Lyon vs. The Ocean National Bank 60, N. Y. 278, the New York Court of Appeals approve this decision of the Supreme Court of Vermont and decides to the same effect.

Mr. Redfield, the well known author publishes in the American Law Register for 1875, Vol. 14, page 342, an elaborate review of the decision in Wiley *vs.* The Bank, *supra*, and also of the decision in the case of Foster *vs.* Essex Bank, 19 Mass., 497, which has been referred to as upholding a contrary doctrine. He says, among other things:

"*The power of Congress in creating banks of discount and deposit is restricted by the Constitution under which the power is derived, to the furnishing of a circulating medium, and the convenient use of the same in the transactions of trade and commerce. Congress could not, therefore, by express grant, create a corporation for the mere custody of coin, bonds and other valuables for the convenience or security of the owners, which the States unquestionably might do.*

"It should, therefore, be shown that this matter of receiving special deposits comes fairly within the range of the business of the corporation, in order to give the practice of the officers of the bank in accepting them any force in fixing the responsibility of the corporation. But this, we believe, it will be impossible to maintain with any plausibility. These special deposits are not only outside the proper business of a bank either of discount or deposit, or both, but there is no fair way in which it can be made accessory to the

banking business of any form or degree. Special deposits are mere merchandise, whether they consist of American or foreign coin, National, State, or municipal bonds, or silver or gold plate, or any other valuable commodity in small space, such as lace or cashmere shawls. The bank acquires no property in such deposits and no lien upon them, except by special contract, for any indebtedness of the depositor. It cannot, therefore, increase its discounts on their account. They are made in this form often when consisting of coin, because the depositor is unwilling to trust to the responsibility of the bank alone. He prefers to remain the owner of the coin. There is no reason why these deposits should be made, or should ever have been made, in banks, because of their general business under their charters, but solely on account of their possessing extra means of keeping such deposits safely; and there is no more reason for calling such packages 'deposits,' than for calling similar packages 'deposits' when left with any other warehouseman for safe custody. In former times the banks were the only places where such valuables could be made safe from depredation. Hence the officers of the bank and some of the shareholders probably and naturally would avail themselves of the protection of the bank vaults. But it seems to us an entire mistake and misapprehension, to treat this as an extension of the business of the bank. It is no business of the bank any way, and so every one must consider it who views it justly. The bank derives no profit from it and acquires no interest in the deposits. *Ex parte Brown*, 3 Deacon, 91; *ex parte Bond*, 1 M. D. and G. 10; and being clearly outside of its proper functions, every one is bound to treat it as a mere indulgence granted by the officers of the bank to its friends, to be accepted by those who use it, wholly at their own risks. There is no reason why such deposits might not now be just as well made in the safe of a railway or manufacturing corporation, and would any one claim that this imposed any responsibility upon such corporations? Surely not."

* * * * * * *

"We are fully aware that the practice of corporations has often been allowed to extend their responsibility somewhat beyond the precise terms of definition used in their charters. It often becomes almost indispensable to give the range of the business of corporations this extension in order to escape absurdities. It is upon this ground that the courts have

felt compelled to hold railways responsible upon contracts for transportation off their immediate lines. But this rule of the extension of the business of a corporation by the acquiesence of the corporators in the officers doing business in a somewhat wider range than the terms of the charter seemed to have contemplated, must always be very clearly shown, and must never be allowed to extend to any business of an entirely different character: *Allegheny City vs. McClurkan*, 14 Pennsylvania St. 81; *Houldsworth vs. Evans*, L. R. 3 Ho. Lds. 263, by Ld. Cranworth; *British Provident Insurance Company; Ex parte Grady*, 9 Jur. N. S. 631. It is here said, what all good lawyers know, that where there is a defect of capacity in the company to do the act, the power cannot be created by the express agreement of the shareholders, nor can it be presumed from any extent of acquiesence. But where only certain formalities are required to the valid execution of the act, as the consent of a general meeting of the shareholders, that will be presumed from acquiesence. This is unquestionably the settled rule of law upon the subject at the present time.

"How, then, can it be argued with any plausibility, that these banks of discount and deposit have no defect of authority to become warehousemen for the safe custody of valuable parcels? For it is impossible to argue, with plausibility even, as we have before intimated, that this function is any more nearly connected with the appropriate duties of banks than of railways. It is a business entirely distinct from that of either, except that railways keep warehouses for the safe deposit of goods awaiting transportation or delivery, and banks keep vaults for the safe custody of their own coin or bills, or other valuable papers, and also for the safe keeping of their collateral securities, which is the only form in which a bank of discount and deposit can become responsible for the safe keeping of any special deposit—that is, when the deposit is accepted as security. In every other case the deposit is with the officer accepting it, and not with the bank, and his placing it among the securities of the bank is wholly unauthorized so far as the corporation is concerned. It is, too, superadding to the legitimate functions of the bank, not only a distinct business and one having no proper connection with that of the bank, but *one also of a very dangerous character.* This business of keeping special deposits has become so extensive and so dangerous to the banks that it has become a distinct occupation in the cities,

in which large capital is invested, and extensive precautions are taken, altogether inconsistent with the ordinary business of banking, which only shows more clearly the mistake in allowing to attach it to the banks. It seems to us, therefore, that if the courts have been pressed, by the exigencies of one class of business, at an early day, to adopt a rule of law inconsistent with the acknowledged principles, applied to analogous questions, it is time to recede from the position when the demands of that class of business have brought about such changes as no longer to require the protection of the exceptional rule of law. For if anything is clear upon principle, it seems to us this is, if we have made ourselves understood. And we must be allowed to express our gratification that the Court, in the principal case, have had the self-reliance to place this question upon what we believe every lawyer will recognize as its true basis, and to disregard a course of decisions obviously in violation of principle, and resting solely upon the *Essex Bank Case* which seems originally to have been decided upon the maxim, *Communis error facit jus*, if any case ever was; and that is not a maxim which has ever received much countenance from the courts so far as its literal import is concerned."

Judge Wheeler, in the case of Wiley vs. The Bank *supra* disposes of the decision in Foster *vs.* The Essex Bank as follows:

"Foster *vs.* The Essex Bank is the only one of the cases cited in argument, or that has been observed, that has involved any question enough like the leading one in this case to afford any direct guide for its decision; and there is this difference between that case and this, that in that case the charter did not proceed to express what powers the bank should have to make contracts and to do business, while in this the act under which this bank is organized does expressly set forth what powers the bank should have and does not include power to take special deposits among them. This case would have been like that as to powers of the banks if the act of Congress after authorizing the formation of banks with powers to contract, sue, and be sued, had stopped there, without setting forth anything about the business as to which they might contract. As it is, the case has had to be decided more upon the construction of the act

of Congress, considered with reference to settled principles that stand about the subject, than upon decided cases. And upon that act so considered it is determined here that the taking such special deposits to keep, merely for the accommodation of the depositor, *is not within the authorized business of such banks, and that their cashiers have no power to bind them to any liability on any express contract accompanying or any implied contract arising out of such taking.*"

Plaintiff below gave evidence tending to show that the other officers of the bank, as well as the cashier, knew of this and other similar deposits, but such testimony cannot affect the question in this case.

Touching this point the Supreme Court of Connecticut, in the case of Hood *vs.* N. Y. & N. H. R. R. Co., pages 1 and 502, say: 22 Vol Conn R

"The plaintiff introduced circumstantial evidence on the trial, to prove that the directors of the company made the contract, and particularly that their subordinate agents had for some six months previously been in the practice of contracting with other persons as they did with the plaintiff. Suppose this is true, and that the knowledge and consent of the directors may be properly inferred from this continued practice of the directors: this will not place the plaintiff's case, in our judgment, on any higher ground than if the directors had by a formal vote contracted with the plaintiff to carry him to Collinsville. It being a question of power, silent acquiescence in the acts of subordinate agents does not make a stronger case; for if a formal contract is not obligatory on the company, one proved by inferior or circumstantial evidence certainly is not. The kind of evidence is not material."

"Should the directors of a savings bank, or of any bank contract with a ship-builder for a steamship to navigate the ocean, would this contract bind the company? Certainly not—because the directors have no power to make it; nor would they have more were they to make such contracts from day to day. The legislature has absolutely marked the limit of their power, and they cannot exceed it under the charter; and if the directors, even with all the stockholders at their side, transcend the limits of their charter

and make contracts foreign to their business; they only act for themselves. The reason is, there can be no consent of the corporation. The consent of individual stockholders, however repeated, is not their consent, nor is it admissible proof to establish consent; so that, if it were true every stockholder had expressed his consent, it would make no difference in the case. If this is not so, there are no restrictions or limitations on chartered companies, and they may do anything and everything the directors please which is not absolutely unlawful. The exercise of power is held to prove itself, which is absurd "

To any suggestion that a corporation is liable for, the torts or wrongs that it may commit, the answer is—

1. There is no such question in this case. The question here is, can the officers of a National Bank bind its stockholders and creditors by such a contract as here sued upon and evidenced by said receipt?

2. National Banks are corporations whose powers and duties are prescribed, defined, and limited by the act of Congress under which they are organized; they are, therefore, not liable for any act of their agents or officers outside of these powers and duties, and not within the scope of their legitimate business.

Story on Agency, 452.

What follows is all that the Supreme Court of the State say in their opinion in this case as to the liability of the bank:

"Looking at the almost universal practice of banks of all kinds to accept special deposits of valuable securities from their customers, and the evidence in this case that such was the habit of this bank, with the privity and knowledge of the directors and officers, we are of opinion that a liability for safe keeping is raised by the receipt given to the plaintiff for her bonds. If the bonds be lost cr stolen through the gross negligence of the bank this liability be-

comes fixed. The debatable question in this case is whether there was sufficient evidence of such negligence to be submitted to the jury."

As to this learned opinion it may be proper to remark:

1st. There is not a particle of evidence in this case of the "almost universal practice of banks of all kinds to accept special deposits," but on the contrary it is believed that the practice is quite otherwise as to National Banks.

2. Does the Court mean by "valuable securities" something given to the bank for its own protection? If so, then the words are inapplicable to this case; or does the Court mean that the receipt in question raises a liability upon the bank for the safe keeping of bonds, notes, &c., which a similar receipt would not raise for the safe keeping of coin, bullion, or other valuables deposited under like circumstances.

3. According to the ruling of the State court in this case, the powers of a corporation are not determined by its charter or the act of the Legislature by which it is created, but by its "habit" of doing business; so that the power of an association of persons organized under the act of Congress as a National Bank, to engage in a real-estate brokerage, or the manufacture of gas, depends not upon the provisions of said act, but upon the "habit" of the association.

This doctrine cannot be maintained upon principle or authority.

Fowler *vs.* Scully, 72 P. S. R., 456.
Talmake *vs.* Pell, 3 Selden N. Y., 328.
Weckler *vs.* First National Bank, 42 Maryland, 581.
N. Y. Fire Ins. Co. *vs.* Ely, 5 Conn., 572.

GEO. H. WILLIAMS,
For Plaintiff in Error.

IN THE

Supreme Court of the United States.

No. 166

THE FIRST NATIONAL BANK, OF CARLISLE, PENNSYLVANIA, WILBUR F. SADLER, Receiver, Plaintiff in Error,

vs.

FANNIE L. GRAHAM.

In Error to the Supreme Court of the Commonwealth of Pennsylvania.

IN THE

Supreme Court of the United States.

No. 166.

THE FIRST NATIONAL BANK, OF CARLISLE, PENNSYLVANIA, WILBUR F. SADLER, Receiver, Plaintiff in Error,

vs.

FANNIE L. GRAHAM.

In Error to the Supreme Court of the Commonwealth of Pennsylvania.

COUNTER STATEMENT AND BRIEF OF ARGUMENT OF DEFENDANT IN ERROR.

The First National Bank, of Carlisle, had a capital stock of $50,000, divided into 500 shares, of the par value of $100 each. From November 9, 1869, Samuel Hepburn, President, owned 460 shares; his son, C. H. Hepburn, Cashier and Director, 10 shares; Hopewell Hepburn, a son and Director, 10 shares; H. M. Hepburn, a son and Director, 10 shares, from Octo-

ber, 1871, and John G. Orr, Teller and Director, held the remaining 10 shares.—Record, pages 38 and 39. With one exception, these gentlemen were directors of the Bank from 1870.—Record, page 37. On October 22, 1868, Miss Fannie L. Graham deposited in the Bank, for safe keeping, $4,000 of U. S. 5-20 bonds, and received therefor the receipt printed on pages 5 and 6 of Record, and signed by C. H. Hepburn, Cashier. Before and after that time, the officers of the Bank had been accustomed to receive bonds in that way. They were entered in one of the books of the Bank.—Record, 36. The fact of receiving them was talked over frequently by the directors at meetings of the board.—Record, 38. Some of the directors deposited packages in the Bank in the same way—Record, 37—and quite a number of persons had such deposits there—Record, 36, 37 and 38. The Court below charged the jury—Record, 47—that they "must be satisfied from the" "evidence that the plaintiff's bonds were received by" "the Cashier for safe keeping with the knowledge and" "acquiesence of the officers and directors of the bank," * * * * and "if the Cashier was in the habit of re-" "ceiving such deposits for safe keeping, and this habit" "was known and acquiesced in by the officers and di-" "rectors, then their knowledge of the receipt of the" "deposit of the plaintiff's bonds into the Bank for" "safe keeping, and their acquiescence in their recep-" "tion thereof, would be presumed." The verdict of the jury therefore establishes the fact that the bonds of Miss Graham were so received.

Her bonds were first missed from the Bank August 5, 1871. C. H. Hepburn, the Cashier—Record, 40—and John G. Orr, Teller—Record, 43—were examined on part of the Bank, and stated how and where the bonds were missed, what care had been taken of them, and the efforts made for their recovery. Their statements as to the loss of the bonds were contradicted in

rebuttal—Record, 45. Their credibility was therefore for the jury, and was passed upon. Miss Graham was assured by the Cashier—Record, 34—that she would lose nothing; it was their loss, not hers; and to come and get her interest as before, and the President—Record, 35—told her the same thing. Miss Graham was subsequently credited upon the books of the Bank with the coupons and premium on her bonds down to and including the coupons for July, 1873, prior to the failure of the Bank, with one exception, when she was paid the money.—Record, 35. The Cashier stated—Record, 43—"I meant that my father and myself had" "made an individual matter of it when I told Miss" "Graham to come on and get her interest. We had" "to the credit of profit and loss several thousand dol-" "lars, from which we could have declared a dividend" "and passed the amount to our own credit, but in-" "stead of that we concluded to let that fund remain" "there to meet these things, and charge these things" "against it as they came in. * * * The interest" "paid plaintiff was charged off to profit and loss ac-" "count. Father and I talked it over about making" "no dividend and paying it off as the simplest way" "of doing. We did in bank pretty much as he and" "I agreed upon. The surplus fund was $25,000." "Think we declared no dividends after this."

A plan of the banking room—Record, 45—was in evidence, a copy of which is attached, and from the construction of it, the size of the missing packages—page 43, the omission of all meetings of the board from 23d November, 1869, until October 1st, 1873, when the Bank suspended, except for the election and organization of new boards, and four other meetings—page 39, from enjoining secrecy upon Miss Graham—page 34, and from the entries upon the books of the Bank, as above cited, it was contended, and found by the jury as a fact, that there was gross negligence in the care of

the bonds of Miss Graham. We have, therefore, as the result of the verdict, the finding of the following facts:

1st. The bonds of Miss Graham were received for safe keeping by the Bank's Cashier as such, in accordance with a usage or custom known to and acquiesced in by the Officers and Directors of the Bank.

2d. The Officers of the Bank were grossly negligent in the care of the bonds, by reason of which they were lost.

BRIEF OF ARGUMENT.

The only question that can be reviewed under the Act of Congress of Sept. 24, 1789. Revised Statutes 132, section 709, arises upon the 10th error assigned in the Supreme Court of Pennsylvania to the answer of the Court below, to the Defendant's first point—Record 57—and is,

Can the First National Bank of Carlisle, Pa., be held liable for the bonds of Miss Graham, left with it for safe keeping?

It may be conceded that if the Bank itself were asserting the right to receive deposits for safe keeping, it would be *ultra vires*, because its charter is silent on the subject. "That which a company is authorized to do by its acts of incorporation it may do; beyond that all its acts are illegal."

Commonwealth vs. Erie & N. E. R. R. Co.—3 Casey, 357.

Bank of Penna. vs. Com'th.—7 Harris, 155.

Venango National Bank vs. Taylor.—6 P. F. Smith, 14.

Bank of U. S. vs Dandridge.—12 Wheaton, 64.

Head vs. Boston Insurance Company, 2 Cranch, 127.

But when the Bank is sought to be charged with the consequences of an act *ultra vires*, can it shield itself behind its own wrong? Can it hold itself out to the world as authorized to do certain acts, and when innocent parties have relied upon those acts and sustained a loss, can it say the charter conferred no such authority, and the Bank is not liable?

In the Phila. Wil. & Balt. R. R. Co. vs. Quigley—21 Howard, 210—this Court say:

"The result of the cases is, that for acts done by the agents of a corporation, either *in contractu* or *in delicto* in the course of its business and of their employment, the corporation is responsible, as an individual is responsible under similar circumstances. At a very early period it was decided in Great Britain, as well as in the United States, that actions might be maintained against corporations for torts; and instances may be found in the judicial annals of both countries of suits for torts arising from the acts of their agents, of nearly every variety. *Trespass quare clausum fregit* in 9 Sergt. & R., 94; 4 Mann & G., 452. Assault and battery; 4 Gray, Mass. R., 465; 6 Ex. Ch., 314. For damages by a collision of rail-cars and steamboats; 14 How., 465; 19 How., 543. For a false representation.—34 L. and Eq. R., 14; 11 Wheat., 59.

The case of the National Exchange Company, of Glasgow, vs. Drew, 2 Macqueen, H. of L. Cas., 103, was that of a company in failing circumstances, whose

managers sought to appreciate its stock by a fraudulent representation to the company and a publication of the report as adopted by it, that its affairs were prosperous, two of its stockholders were induced to borrow money from the company to invest in its stock. The question in the case was whether the company was responsible for the fraud?

In the House of Lords, upon appeal, Lord St. Leonards says: "I have come to the conclusion, that if representations are made by a company fraudulently, for the purpose of enhancing the value of stock, and they induce a third person to purchase stock, those representations so made by them bind the company. I consider representations by the directors of a company as representations by the company, although they may be representations made to the company." * * * * The report "becomes the act of the company by its adoption and sending it forth as a true representation of their affairs; and if that representation is made use of in dealing with third persons, for the benefit of the company, it subjects them to the loss which may accrue to the party who deals, trusting to those representations."

In Life and Fire Insurance Company vs. The Mechanic Fire Insurance Company, 7 Wendell, 34, the Court says: "It was contended, however, by the counsel for the plaintiffs that if the loan was illegal and unauthorized, it must be considered the act of the agents or officers of the company, and not of the company itself; and that they therefore ought to be allowed to recover back their property thus improperly disposed of. This would be a most convenient distinction for corporations to establish, that every violation of their charter, or assumption of unauthorized power on the part of their officers, although with the full knowledge and approbation of the directors, is to

be considered the individual act of the officers, and is not to prejudice the corporation itself. There would be no possibility of ever convicting a corporation of exceeding its powers, and thereby forfeiting its charter or incurring any other penalty, if this principle could be established."

In Green vs. London General Omnibus Company, 7 C. B. (N. S.) 302—Erle, J. C., says: "The whole course of the authorities from the case of Yarborough vs. The Bank of England, 16 East, 6, down to Whitfield vs. The South-Eastern Railway Company, 1 Ellis, Bl. & E. 115 (E. C. L. R. vol. 96), which was in reality an action against the Electric Telegraph Company, shows that an action for a wrong will lie against a corporation, where the thing that is complained of is a thing done within the scope of their incorporation, and is one which would constitute an actionable wrong if committed by an individual."

In Merchants' Bank vs. State Bank, 10 Wal., 645, Justice Swayne says: "Corporations are liable for every wrong of which they are guilty, and in such cases the doctrine of *ultra vires* has no application."

To the same effect are the following authorities: Beach vs. Fulton Bank, 7 Cow., 485; Hawkins vs. Dutchers', etc., Steamboat Company, 2 Wend., 452; Hay vs. Cohoes Co., 3 Barb., 42; Watson vs. Bennett, 12 *id.*, 196; Mayor, etc., of New York vs. Bailey, 2 Den., 433; Thatcher vs. Bank of State of New York, 5 Sandf., 121; Blackstock vs. New York and Erie R. R., 1 Bosw., 77; Leaman vs. Mayor, etc., of New York, 5 *id.*, 414; State vs. Morris and Essex R. R. Co., 3 Zabr., 360; Hamilton County vs. Cincinnati and Wooster Turnpike Co., Wright, 603; Town Council of Akron vs. McComb, 18 Ohio, 229; Carman vs. Steubenville and Indiana R. R. Co., 4 Ohio St., 399;

Chestnut Hill, etc., Turnpike Co. vs. Rutter, 4 S. & R., 6; McCready vs. Guardians of the Poor, 9 *id.*, 94; Phil. Com. Pl. Bank of Kentucky vs. Schuylkill Bank, 1 Pars. Sel. Cas., 180, 251; Crawfordsville R. R. Co. vs. Wright, 5 Ind.. 252; Illinois Central R. R. Co. vs. Ruby, 17 Ill., 580; Same vs. Read, 37 *id*, 484; Donaldson vs. Mississippi and Missouri R R. Co., 18 Iowa, 280; McKim vs. Odour, 3 Blan. Ch., 407, 421; Whiteman vs. Wilmington and Susquehanna R. R. Co., 2 Haring., 514; Underwood vs. Newport Lyceum, 5 B Monr., 129; Edwards vs. Union Bank of Florida, 1 Fla, 136; M'Dougald vs. Bellamy, 18 Ga., 411; Lyman vs. White River Bridge Co., 2 Aiken, 255; State vs. Vermont Central R. R. Co., 27 Vt., 103; Riddle vs. Proprietors of Locks, etc, 7 Mass., 187; Thayer vs. City of Boston, 19 Pick., 511; Stevens vs. Boston and Miami R. 1 Gray. 277; Morse vs. Fitchburg R. Corp., 4 *id.*, 65; Hewett vs. Swift, 3 Allen, 420; 3 Stark, 50; 1 Ad. & Ell, 526; 3 Mer. & M., 771; 6 Car. & P., 292; 2 Darl. (N. S.), 113; 5 Scott N. R, 457; 2 Gale & D., 236; 9 Car. & Paine, 469; 2 Eng. L. & Eq. Rep., 406; 6 Exch., 814; 26 Eng. L. and Eq,, 44; 10 Ex., 10; 31 Eng. L. and Eq., 536; 5 H. of L. Cases, 297; 32 Eng. L. and Eq., 1

These cases esrablish the position beyond doubt that a corporation is liable for the acts of its agents in the line of their employment, but *ultra vires* the corporate charter.

In N. Y. & N. H. R. R. Co. vs. Schuyler et. al., 34 New York R., 49, Davis J. says: "A corporation is liable to the same extent and under the same circumstances as a natural person for the consequences of its wrongful acts, and will be held to respond in a civil

action at the suit of an injured party for every grade and description of forcible, malicious, or negligent tort or wrong which it commits, however foreign to its nature *or beyond its granted powers* the transaction may be." "Corporations have no right to violate their charters, but they *have capacity to do so*, and to be bound by their acts where a repudiation of such acts would result in manifest wrong to innocent parties. * * * The plea of *ultra vires*, according to its just meaning, imports, not that the corporation could not and did not in fact make the unauthorized contract, but that it ought not to have made it. Such a defence, therefore, necessarily rests upon the violation of trust or duty toward the shareholders, and is not to be entertained where its allowance will do a greater wrong to innocent third parties. The acquiescence of the stockholders in the abuse will prevent the interposition of such a plea." Bissell vs. The Michigan South. & Nor. In. R. R, Co., 22 New York Repts., 258 and 9.

"And now it seems to be generally admitted that they (corporations) are civilly responsible in their corporate capacity for all torts which work injury to others, whether acts of omission or commission, for negligence merely, and for direct violence." Goodspeed vs. East Haddam Bank, 22 Conn. Reports, 538.

"I think the law on this subject is correctly laid down by Lord Wenleysdale in his judgment in the South Yorkshire Railway Company vs. The Great Northern Railway Company (9 Exch. 84), and by Mr. Justice Erle in the Mayor of Norwich vs. The Norfolk Railway Company, 4 E. & B., 413 (E. C. L. R. vol. 82). It is to the effect that, generally speaking, corporations are bound by their contracts as much as individuals. * * * But where a corporation is created by an Act of Parliament for particular purposes, with special powers, another question arises, and the contract

does not bind them, if it appear by the express provisions of the statute creating the corporation, or by necessary and reasonable inference from its enactment, that the contract was *ultra vires*, that is that the Legislature meant that such a contract should not be made. The question, Lord Wenleysdale says, (9 Exch., 85) appears to be this: "Whether it can be reasonably made out from the statute that the contract is *ultra vires*—in other words, forbidden to be entered into." Bateman vs. Mayor, etc., of Ashton—under—Lyne, 3 Hurlstone & Norman's Reports, 335; S. Y. Railway Co. vs. G. N. Railway Co., 9 Exch. Rep., 84.

"But if a body corporate has, as incident to it, a general capacity to contract, the question is, Does the statute creating the corporation by express provision, or necessary implication, show an intention in the Legislature to prohibit and so avoid the making of a contract of this particular kind?"—Riche vs. Ashbury Railway Carriage Co., 9 Law Reports—Court of Exchequer, 264, decided in 1873.

"I think, therefore, we are entitled to consider the question to be not whether the present defendants had, by virtue of their acts of incorporation, authority to make the contract, but whether they are, by those statutes, forbidden to make it. And I think the cases subsequent to that of the East Anglian Railway Company vs. Eastern Counties Railway Company, 11 C. B., 775 (E. C. L. R., 73); 21 L. J. C. P., 23; and more particularly that of Eastern Counties Railway Company vs. Hawkes, 5 H. L. C., 331, show that the present contract (assuming it to be what it purports to be) is not forbidden, and consequently is legal as against the corporation, though a stockholder (if there be one) who did not acquiesce in the promotion of this bill and the making of such contract by the directors, may, perhaps have a right in equity to have the contract

cancelled." Taylor vs. C. & M. Railway Co., 2 Law Reports—Court of Exchequer, 384.

Where the law forbids an act, but does not declare it void, it stands good. See authorities cited in National Bank vs. Matthews, 8th Otto, 627, 8 and 9. In that case, this Court sav of the Act of Congress incorporating National Banks, where a mortgage and a note secured by it was transferred to a National Bank, "We cannot believe it was meant that stockholders, and perhaps depositors and other creditors, should be punished and the borrower rewarded by giving success to this defense (*ultra vires*) if the offensive fact shall occur. The impending danger of a judgment of ouster and dissolution, was, we think, the check, and none other contemplated by Congress. That has been always the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke the application. A private person cannot directly or indirectly usurp this function of the Government."

Again where a contract *ultra vires* is executed, it does not lie in the mouth of the corporation to deny its liability, nor can an individual, in such case, deny his liability to a corporation. There is a number of cases sustaining this position: Prince of Wales Ass. Co. vs. Harding, 96 Eng. Com. Law Reports, 183. *In re* Port of London Assurance Co's Case, 5 DeG. M. and G., Eng. Chan. Reports, 481, where Lord Justice Turner says, "I may add that, where a purchaser has taken possession of and enjoyed the subject matter of a contract, it is, in my opinion, the duty of this Court to make every reasonable presumption in favor of the validity of the contract." "This principle has been repeatedly held as applicable to an individual attempting to screen himself from liability when contracting with a corporation, and in the case of a corporation,

when seeking to escape responsibility, on the plea of *ultra vires* for acts deliberately done, with all useful and needful formalities; and where they have received the entire benefit they contracted for, such a defense should no longer be tolerated in our Courts. * * * When the question is merely as to the capacity to contract, a party who has had the benefit of the contract should not be permitted, especially where there is no unlawful intent charged upon the other party, and he is in no sense *in pari delicto*, to question its validity. To deny relief to a plaintiff thus situated, would be, substantially to secure to the party deliberately violating one of the laws of its existence, and where no guilty complicity can be charged upon the other party, the fruits of an illegal transaction, and operate as a premium upon repudiation and fraud."

DeGroff vs. Amer. Linen Thread Co., 21st New York Reports, 126; Tracy vs. Talmadge, 14 New York Reports, 181.

"The interests of the community and the policy of the law demand that corporations should be divested of every feature of a fictitious character which shall exempt them from the ordinary liabilities of natural persons for acts and injuries committed by them and for them. Their immunities for wrongs are no greater than can be claimed for others, and they are entitled to an equal protection for all their rights and privileges, and no more." Goodspeed vs. The East Haddam Bank, 22 Conn. R., where a Bank was held liable for a vexatious suit.

So in Beach vs. The Fulton Bank, 7 Cowen, 484, a Bank was held liable in trover for *flour and lard.*

"The doctrine of implied agency, arising out of negligence, has its true basis in the principle of *estoppel in*

pais, and is based upon the injustice of allowing a party to be the author of his own misfortune, and then to charge the consequences upon others; and it implies an act in itself invalid, and a person forbidden for equitable reasons to set up its invalidity."—The N. Y. & N. H. R. R. Co. vs. Schuyler et. al., 34 New York R., 30.

"Contracts with corporations made in excess of their powers, which are purely executory on both sides, and where no wrong will be done if the parties are left in their previous situation, should not be enforced, because such contracts contemplate an unauthorized diversion of corporate funds, and, therefore, a breach of private trust; but the executed dealings of corporations must be allowed to stand for and against both the parties, when the plainest rules of good faith so require."

Parish vs. Wheeler, 22 New York, 503.

White vs. Franklin Bank, 22 Pickering, 181.

Tracy vs. Talmage, 14 New York, 162.

DeGroff vs. Am. Linen Thread Co., 21 N. Y., 124.

Bissell vs. M. S. & N. Y. R. R. Co., 22 N. Y., 258.

Firth vs. LaRue, 15 Barb., 322.

Gould vs. Town of Onesta, 3 Hun, 401.

Hazelhurst vs. Savannah R. R. Co., 43 Georgia, 13.

Southern Life Ins. Co. vs. Lanier, 5 Fla., 110.

Bradley vs. Bullard, 55 Ill., 417.

Gas Co. vs. San Francisco, 9 Cal., 453.

Chicago Building Soc. vs. Crowell, 65 Ill, 458.

From all the authorities cited, the following principles are clearly deducible:

1st. Where the contract is not forbidden or *malum in se* every presumption must be made in favor of its validity.

2d. Corporations are liable for torts, whether the act resulting in the wrong was *ultra vires* or not.

3d. That a contract, *ultra vires*, is binding upon a corporation when made within the apparent scope of its charter.

4th. They are liable on contracts *ultra vires* where the party contracted with was not *in pari delicto*, and where they had held themselves out as capable of making such contracts and were in the habit of so doing.

5th. They are liable to third parties on executed contracts though *ultra vires*, and they can only be relieved by placing the party in the position he occupied prior to the contract.

6th. Acquiescence by shareholders in the contract made prevents the plea of *ultra vires*, and the corporation is estopped from interposing it.

Bearing these principles in mind, let us examine the act of Congress of June 3, 1864—Revised Statutes, 999, sec. 5136. It is as follows, to wit: "Upon duly making and filing articles of association and an organization certificate the association shall become * * * a body corporate and as such * * * it shall have power—" * * * * *

Third. *To make contracts.*

* * * * * *

Seventh. To exercise * * all such incidental powers as shall be necessary to carry on the business of banking * * *by receiving deposits, &c., &c.*

The act therefore makes the Bank a body corporate, with general power to *make contracts*, and to do a banking business "by receiving deposits." Deposits have a technical meaning, and no authority need be cited now to show that the term does not include "deposits for safe keeping" To the common mind, however, there is nothing in the act itself to convey that information. The term required judicial interpretation and limitation. A person dealing with the Bank, therefore, sees by the law that it has a general power "to make contracts" and "to receive deposits." He finds that the Bank is in the habit of making such contracts; it has become a course of dealing with the Bank; it holds itself out as having the power, and invites people to so deal with it, and its charter does not say that it shall not make such contracts. A person so dealing with it can not, in any sense, be said to be *in pari delicto*—bound to know, that under the law such a contract could not be made The contract is not *malum in se*, and the party is not *particeps criminis*. It is but a breach of trust, by the corporation, towards its shareholders; an act that it may be restrained from doing by the Courts at the suit of stockholders; an act that may work a forfeiture of its charter at the suit of the Government. It invited confidence, and the confiding one, innocent of any wrong intent, and relying solely upon the Bank's course of dealing, lost by its neglect of a voluntarily assumed duty. Is there any reason in equity or justice, or in the policy of the law, that should exempt the party, whose act caused the loss,

from bearing it? Is there any reason why the innocent party should suffer? Can the Bank restore Miss Graham to the position she occupied before she dealt with it? If it can not, and if its inability to do so is the result of its own act, there is every reason, in law and equity, why it should be stopped from denying its liability? To whom would any injury result by holding the corporation responsible? Not to the stockholders, as alleged by the Plaintiff in error; because the stockholders representing $48,000 out of $50,000 of a capital stock assumed the loss, and disclaimed any right to dividends out of several thousand dollars to the credit of profit and loss, and out of a surplus fund of $25,000.—See Record 43. They not only disclaimed any right to dividends after this loss occurred, but they even charged a portion of it off to profit and loss, and no dividend was afterwards declared by the Bank for that very reason; not to creditors, because the non-declaration of dividends out of the profits and out of the surplus fund more than compensated them. They could not take what belonged to stockholders. But neither stockholder nor creditor asks the Court for protection. They are conscious that they neither desire nor deserve it. The Government does not ask it. The law does not demand it. It can vindicate itself by the appropriate "judgment of ouster and dissolution," which "was the check, and none other, contemplated by Congress," for this alleged *ultra vires* act of the corporation, as said in National Bank vs. Otto, *supra*.

Our propositions therefore, upon the facts, are

1st. If the contract was *ultra vires*, Miss Graham was not *in pari delicto* with the Bank

2d. The stockholders acquiesced in and assumed the loss by their non-claim to dividends.

3d Creditors of the Bank for the same reason are not injured.

4th. The Bank should be estopped from setting up any want of power to contract with Miss Graham after its act has entailed loss upon her.

The results arrived at in this case are sustained in the following cases, to wit:

Lancaster Co. Nat. Bank vs. Smith, 62 Penn. R., 54.

Scott vs. National Bank of Chester Valley, 72 Penn'a R., 471.

De Haven vs. Kensington Nat. Bank, 81 Penn'a R., 85.

First National Bank vs. Graham, 79 Penn'a R., 106.

Smith vs. First Nat. Bank, 99 Mass., 605.

Ray vs. Bank of Kentucky, 10 Bush, 344.

Jenkins vs. Nat. Village Bank, 58 Maine, 275.

Dearborn vs. Un. Nat Bank, 61 Maine, 369.

Chatahoochie Nat. Bank vs. Schley, 58 Geo., 369.

Foster vs. Essex Bank, 17 Mass., 479.

The Plaintiff in Error relies upon Wiley vs. First National Bank, 47 Vermont, 546, as exactly in point. That case stood upon the receipt alone—the only point of resemblance to the case in hand, and it was rightly decided. There was no pretence of power in the Cashier

to bind the corporation—directly or by implication. There was no action by the stockholders and directors. There was no assertion by the Bank that it had the power to receive such deposits. It is not, therefore, in point, because all of these points are essential to the consideration of the real question in this case.

Nor does that case infringe upon Foster vs. Essex Bank, because the Court say, "In Foster vs. Essex Bank, 17 Mass., 497, the Bank was chartered by that name, with power to contract by it and without other express powers, leaving the scope of its corporate business almost wholly to implication; but, according to the special verdict in the case, it had always been its practice to receive special deposits of money and other valuable things, with the knowledge of and without objection by its directors. * * * After much deliberation, it was decided that on account of that practice, and not *because it was a part of legitimate banking business*, the Bank became charged with the liabilities of a depositary of the coin," thus distinguishing between the one commented upon and the one in hand.

The ruling in Foster vs. Essex Bank on this very point has been approvingly quoted by this Court in Bank of U. S. vs. Dandridge, 12 Wheaton, 64, and after the decisions of this Court in Union Gold Hill Mining Co. vs. Rocky Mountain National Bank not yet reported and National Bank vs. Matthews, 8 Otto, 621, the latter over-ruling Fowler vs. Scully, 72 Penn. Sta. Repts., 456, also relied upon by the Plaintiff in Error, sustaining acts of National Banks in open violation of their charters, there is not much room for the construction given by Wiley vs. First Nat. Bank, *ut supra*. The more advanced reasoning of the age sustains the ruling of the Court below.

II. But has this Court jurisdiction of this case?

If it has, it must be because the Act of Congress of 24 Sept, 1789, expressly gives it, the case going up from a State Court.—Revised Statutes 132, Sec. 709.

That Act of Congress gives the Court jurisdiction. 1st. Where the *validity* of a treaty, Statute of the United States, etc., is called into question and *denied*. 2d. Where the *validity* of State Statute, etc., is called in question as repugnant to the U. S. Constitution treaties or laws, and sustained; and 3d. "Where any title," "right, privilege or immunity is claimed under the" "Constitution, or any treaty or statute of, or com-" "mission held, or authority exercised under the" "United States, and the decision is against the title," "right, privilege or immunity specially set up," "or claimed by either party under such Constitution," "treaty, statute, commission or authority."

A slight reference to the facts of the case, so far as established by the verdict, is necessary. They are: 1st. That the Bank, by its officer, received bonds of Miss Graham for safe keeping. 2d. The Bank was in the habit of so receiving bonds. 3d. The habit was known to and acquiesced in by the Officers and Directors of the Bank. 4th. The Bank, through its officers, was grossly negligent in the care of these bonds; and 5th By this gross negligence the bonds were lost.

Against these facts so established, and to be taken as absolutely true for this argument, the Bank takes the position that it is, 1st. The creature of an Act of Congress. 2d. It can only exercise the powers given to it by that Act especially. 3d. The Act does not impower it to receive deposits for safe keeping. 4th. Because it could not *legally* receive Miss Graham's bonds for safe keeping it is not liable for their loss, though they were kept with such gross negligence as to be lost.

If this question is not within the terms of the Act of 1789, the Court is without jurisdiction. The *validity* of an *Act of Congress* is not questioned, and it is, therefore, not within the 1st class of cases under the Act. The validity of a State Statute is not questioned, and it is, therefore, not within the 2d class of cases. It must, therefore, be a *title, right, privilege or immunity* specially set up or claimed under the Constitution—a treaty, statute, commission or authority of the United States.

Does the act of Congress incorporating this Bank give it *immunity* from the consequences of its illegal acts? Has it a *right or privilege* conferred upon it anywhere to escape from its wrongful acts? Has it any title under any act of Congress to forgiveness for misdeeds? The act of Congress neither confers the right to receive deposits for safe keeping, nor does it exempt the Bank from the consequences of the gross negligence of its officers. It is simply silent on the question.

An act of Congress, the Constitution, a treaty, cannot by *mere silence* confer *a title, right, privilege or immunity*. The statement of the proposition negatives it, and it seems hardly necessary to refer to authority to show that the case does not fall within the third class of cases named in the act of 1789. We select, therefore, but a few from the mass of cases sustaining our proposition:

"In the interpretation of this section of the act of "1789 it has been uniformly held that, to give this "Court appellate jurisdiction, two things should have "occurred, and be apparent on the record: First, that "some one of the questions stated in the section did "arise in the Court below; and secondly, that a deci-"sion was actually made thereon by the same Court, in "the manner required by the section. If both of these

"do not appear on the record, the appellate jurisdiction "fails."—Crowell vs. Randell, 10 Peters, 391.

"We can inquire only whether the record shows that "the Constitution, or a treaty, or a law of the United "States has been violated by the decision of the State "Court. To sustain the jurisdiction of the Court in "the case now under consideration, it must be shown "that the title set up by the City of New Orleans is "protected by the treaty ceding Louisiana to the United "States or by some act of Congress applicable to that "title."—New Orleans vs. DeAnnas, 9 Peters, 234.

"The appellate jurisdiction of this Court, in cases" "decided in the State Courts, is very special and" "limited in its character. * * * It is not every" "misconstruction of an Act of Congress by a State" "Court that will give this Court appellate jurisdiction." "It is where the party claims some title, right, privi-" "lege or exception under an Act of Congress, and" "the decision is against such right, title, privilege or" "exception." Montgomery vs. Hernandez, 12 Wheaton, 129; M'Kinney vs. Carroll, 12 Peters, 66; Coons vs. Gallahen, 15 Peters, 18; Fulton vs. McAffee, 16 Peters, 149; Armstrong vs. The Treasurer of Athens County, 16 Peters, 281; Smith vs. Hunter, 7 Howard, 743; 17 Curtis, 382.

When a case is brought here by a writ of error to a State Court, under the 25th section of the Judiciary Act, this Court can only review the decision of the State Court on the question or questions mentioned in that section. Therefore, if in addition to the decision of the State Court on such question or questions that Court has rested its judgment on some point in the case, not within the provision of that section, and that point is broad enough to sustain the judgment, then, although the ruling of the State Court might be

reviewed on the point, which is of Federal cognizance, this Court will not entertain jurisdiction of the case.—Rector vs. Ashley, 6 Wallace, 142.

"Where there are other questions in the record on" "which the judgment of the State Court might have" "rested, independently of the Federal question, this" "Court cannot review the judgment."—Gibson vs. Chouteau, 8 Wallace, 314; Williams vs. Norris, 12 Wheaton, 117; Hamilton Company vs. Massachusetts, 6 Wallace, 632; Worthey vs. Commissioners, 9 Wallace, 611; Northern R. R. vs. People, 12 Wallace, 364; Haleny vs. Sheet, 14 Wallace, 85.

"Where the record shows that a particular judgment "was given by the highest State Court no writ of error "under the 25th section of the Judiciary Act lies, if the "judgment *may* have been given on grounds which that "section does not make cause of error, as well as upon "some ground which it does so make."—Stoner vs. Franklin Co., 14 Wallace, 15; Cockroft vs. Fose, *idem*, 5.

We conclude therefore,

1st. That the case must fall specially under the act of 1789.

2d. That the pivotal question in the case must be within the terms of tl e aet.

3d. That the Court having rested the liability upon the Bank's gross negligence, after recognizing the acts of its officers, in many similar cases, amounting to a custom, it does not come within the terms of the act.

4th. The Bank does not claim immunity by virtue of a United States statute, but because it violated such a statute.

The Court is therefore without jurisdiction, and the writ of error should be dismissed.

JOHN HAYS,

JAS. H. GRAHAM & SON,
For Defendant in Error.